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N. 2933

No. 14723

**United States  
Court of Appeals**  
for the Ninth Circuit

ROBERT C. WIAN ENTERPRISES, INC., a  
Corporation,

Appellant,

vs.

L. O. PERSINGER and MERLE PERSINGER,  
Individually and as Partners, Doing Business  
as Big Boy Manufacturing Company,

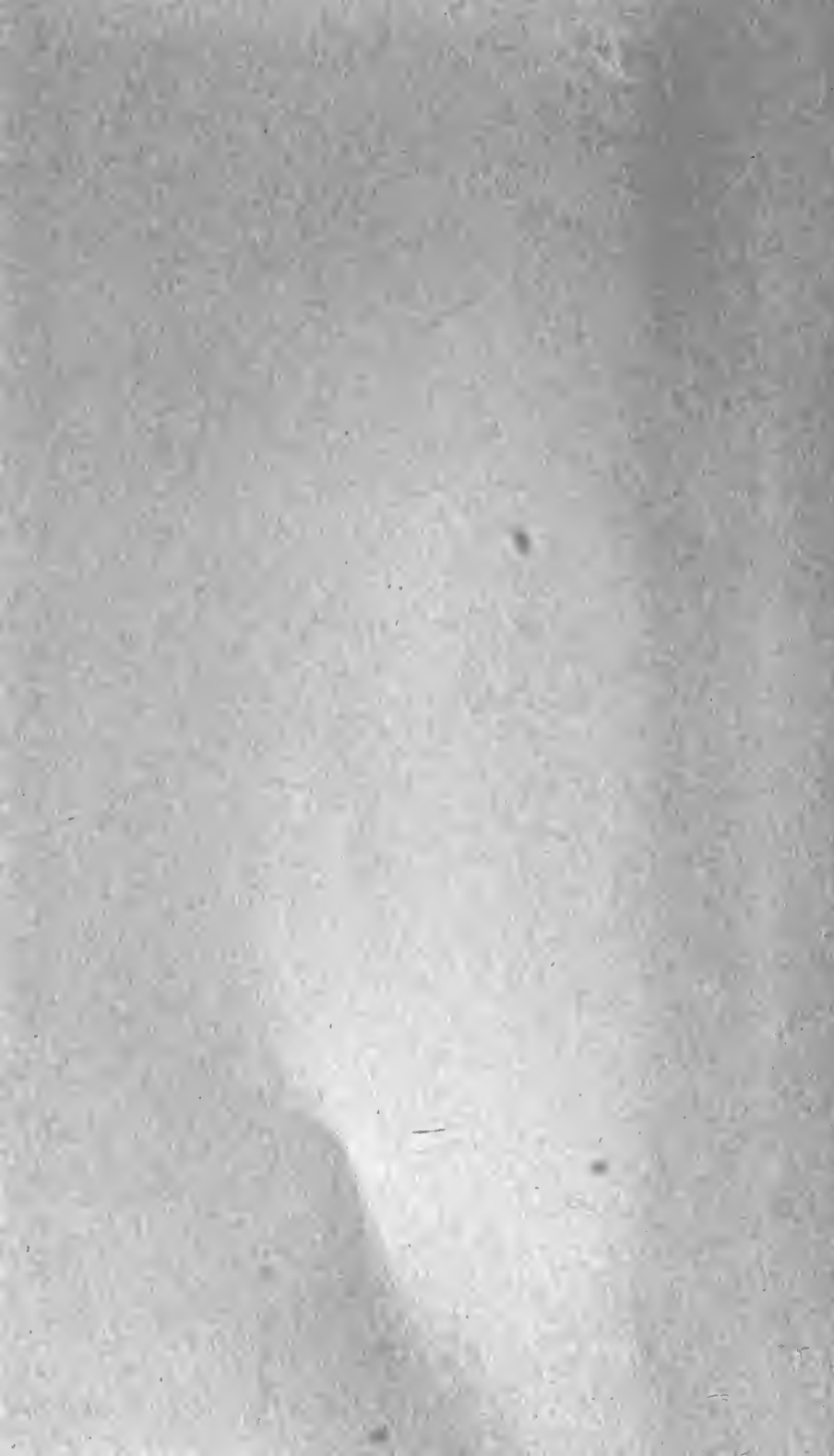
Appellees.

**Transcript of Record**

**Appeal from the United States District Court for the  
Southern District of California,  
Central Division.**

**FILED**

**AUG 23 1955**



No. 14723

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**Court of Appeals**  
for the Ninth Circuit

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

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Los Angeles 13, Calif.

For Appellees:

GEORGE B. T. STURR,

ALBERT LEE STEPHENS, JR.,

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458 S. Spring St.,  
Los Angeles 13, Calif.



In the District Court of the United States, Southern  
District of California, Central Division

Civil Action No. 16497-HW

ROBERT C. WIAN ENTERPRISES, INC.,  
Plaintiff,

vs.

L. O. PERSINGER and MERLE PERSINGER,  
Individually and as Partners d/b/a Big Boy  
Manufacturing Company; DOE I, DOE II and  
DOE III,

Defendants.

AMENDED COMPLAINT FOR INJUNCTIVE  
RELIEF AND DAMAGES

The plaintiff alleges as follows:

First Cause of Action

I.

This is a civil action involving a sum or value exceeding \$3,000.00, exclusive of interest and cost for trade-mark infringement under the laws of the United States. The authority for the original jurisdiction of this Court is found in 60 Stat. 440, 15 U.S.C. § 1121 (1946).

II.

The plaintiff is now, and at all times mentioned herein was, a corporation, duly organized and existing under and by virtue of the laws of the State of California.

## III.

The plaintiff is informed and believes, and on such [2\*] information and belief alleges, that defendants L. O. Persinger and Merle Persinger at all times herein concerned were residents of Los Angeles County, California, and were engaged as partners in a manufacturing business conducted in Burbank, California, under the name of Big Boy Manufacturing Company.

## IV.

Plaintiff is not aware of the true names or capacities, whether individual, corporate, associate, or otherwise, of defendants Doe I, Doe II and Doe III, and therefore sues said defendants by said fictitious names, and leave of Court will be asked to amend this complaint to show their true names and capacities when the same shall have been ascertained.

## V.

Robert C. Wian, the plaintiff's predecessor, first engaged in the restaurant business in 1936, when he opened a single restaurant in Glendale, California, which he operated under the business name and style of "Bob's." In 1938 he developed a new type of hamburger sandwich that is now commonly referred to as a "Double Deck" hamburger sandwich. Mr. Wian thereupon gave to his new hamburger sandwich the name "Big Boy" and began selling and serving it to his customers. At about the same time, he caused to be created a design of

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**\*Page numbering appearing at foot of page of original Certified Transcript of Record.**



a stout boy, dressed in checkered overalls and holding up a hamburger sandwich, one large bite out of which he appears currently to be enjoying. This design has ever since been used in the promotion of "Big Boy" hamburgers and has become widely recognized by the public as identifying those food products.

## VI.

On May 1, 1946, Mr. Wian participated in the formation of the plaintiff corporation and transferred thereto his entire restaurant business, including all rights to the "Big Boy" trade-mark and trade name. The plaintiff corporation began immediately [3] to operate the restaurant business in the same manner as did its predecessor, and continues so to operate right down to the present time. As hereinafter used, the name "Wian" will refer to the business operated by Mr. Wian prior to May 1, 1946, and the business operated by the plaintiff from that date to the present.

## VII.

The Wian operation has grown from the single restaurant established in 1936 until, at the present time, the plaintiff owns and operates ten restaurants in various communities of Southern California, including Glendale, Burbank, Eagle Rock, Pasadena and Van Nuys. During the year ending December 31, 1953, in excess of two million customers were served in the plaintiff's restaurants, and the gross receipts were in excess of \$3,500,000.00.

## VIII.

Ever since "Big Boy" hamburgers were first originated in 1938, they have been sold and served in the Wian restaurants. Each hamburger has been delivered to the customer in a cellophane bag on which the words "Big Boy" and the design are prominently displayed. A photostatic copy of a sample of the bag originally used is attached hereto, marked "Exhibit A," and made a part hereof by this reference, as are all subsequent exhibits. "Exhibit B" displays a bag that is in current use.

## IX.

Ever since 1938 the words "Big Boy" and the accompanying design have been constantly, regularly and widely advertised in Southern California in connection with the Wian restaurant operations. For example:

(a) "Big Boy" hamburgers have always been featured on the Wian menus; "Exhibit C" is a reproduction of a menu used prior to 1947, and "Exhibit D" is a copy of a current menu. [4]

(b) The paper bags in which orders "to go" are filled advertises the "Big Boy" ("Exhibit E").

(c) So does the back of the sales check ("Exhibit F").

(d) The business cards ("Exhibit G" and "Exhibit H") and the Wian stationery ("Exhibit I") have regularly publicized this featured Wian product.

(e) All of the Wian restaurants display large signs advertising themselves as "The Home of the

Big Boy.” The drive-in restaurant located at 910 East Colorado Street, Glendale, and pictured in “Exhibit J,” is typical.

(f) The “Big Boy” products have also been publicized by means of outdoor billboards (“Exhibit K”), signs on the Wian trucks, newspaper and magazine advertising, radio “commercials,” carnival and fair displays and exhibits, match covers, and by numerous other means.

(g) Even the Wian softball team bore the name “Big Boy” on its uniforms and was so publicized. “Exhibit L” is a clipping that represents the results of the 1950 season play-off at Pelanconi Park, which is in Glendale near the Burbank line.

## X.

By means of the promotion and advertising described in paragraph “IX” hereof, the words “Big Boy” and the accompanying design have become widely recognized by the public in Southern California as identifying the entire Wian restaurant operation, and “Big Boy” has thus become a Wian trade name as well as a trade-mark.

## XI.

In the past few years, the plaintiff has engaged in the business of granting franchises to other restaurant operators [5] in various parts of the United States, under which the licensee is given the exclusive right, in his geographical area, to sell hamburger sandwiches and other food products under the “Big Boy” name and design. In return for this

franchise, the licensee undertakes to pay to the plaintiff a monetary consideration, to adhere to the standards of quality set by the plaintiff, and to submit his operation to inspection by the plaintiff. At the present time, "Big Boy" food products are being sold by licensees of the plaintiff in the States of Illinois, Ohio, Kentucky, West Virginia, and Michigan. These licensees are likewise promoting and advertising their "Big Boy" hamburgers and other food products, with the result that the "Big Boy" trade-mark has become widely recognized throughout the United States as referring to food products of the plaintiff and its licensees. "Exhibit M" is a photographic reproduction of a restaurant operated by one of the plaintiff's licensees in Hazel Park, Michigan, under the name of "Dixie Drive-In." Negotiations are currently in process looking toward the establishment of franchises in Kansas, Wyoming and New Mexico, and it is the active plan of the plaintiff that "Big Boy" hamburgers and other food products will be sold, under the plaintiff's authority and supervision, in virtually every locality in the United States.

## XII.

As a result of the widespread and long continuing use and advertising of the trade-mark and trade name of aforesaid, on and in association with the business and products of the plaintiff and its licensees, the said trade-mark and trade name are now, and since long prior to the acts herein complained of have been, extensively and favorably known to

the trade and to the public at [6] large and have come to be recognized throughout a large part of the United States as identifying the businesses of the plaintiff and its licensees; and by reason of the foregoing and of the high quality of their products and services, the plaintiff and its licensees have built up around said trade-mark and trade name good will and reputation of incalculable value.

### XIII.

On July 15, 1952, there was duly and legally issued to the plaintiff a certificate of registration of United States Patent Office trade-mark number 561430. On May 19, 1953, there was duly and legally issued to the plaintiff a certificate of registration for United States Patent Office trade-mark number 574742. Copies of these certificates of registration are attached hereto, marked "Exhibit N" and "Exhibit O," respectively.

### XIV.

Beginning sometime after 1950, the defendants began to engage in the business of manufacturing and selling, at wholesale and retail, various types of home barbecues, braziers and related accessories. They gave to their business the name "Big Boy Manufacturing Company" and advertised their products under the name "Big Boy," and they are still manufacturing and selling their products under that name.

### XV.

Each barbecue and brazier offered for sale by the

defendants has affixed to it a decal, a photostatic copy of which is shown in "Exhibit P."

## XVI.

An advertising booklet, currently circulated by the defendants, refers to "Big Boy Fire Box," "Big Boy Grill," "Big Boy Drip Dish," "Big Boy Skewer," in addition to "Big Boy Barbecues" and "Big Boy Grills," as constituting some of the items offered for sale by the defendants. [7]

## XVII

"Exhibit Q" is a photostatic copy of the back cover of one of the defendants' current advertising booklets, and features what purports to be a picture of their place of business. It displays a large sign on the roof of the building which reads "Home of Big Boy Barbecues" in the same manner that Wian, ever since 1938, has advertised "Home of the Big Boy Hamburger." (See Exhibits C, F, G, I and J.)

## XVIII.

The defendants display the words "Big Boy" on their business stationery. "Exhibit R" is a copy of a letterhead in current use.

## XIX.

One of the defendants' advertising publications displays sketches that presumably depict the various food items that are conducive to preparation on the defendants' barbecues, such as hamburger,



ham, and steak, all of which items are served in the plaintiff's "Big Boy" restaurants. (See Exhibit Q.)

## XX.

The plaintiff is informed and believes, and upon such information and belief alleges, that the defendants also advertise their products in many additional ways, including pamphlets, booklets, newspaper and periodical advertising, etc., all of which display the words "Big Boy."

## XXI.

The defendants have sold their products extensively under the name "Big Boy" in Southern California, and they have also made similar sales in other states. The defendants advertise their products as "Made in California—Sold Across the Nation" and the plaintiff is informed and believes, and upon such information and belief alleges, that the defendants are currently attempting further to promote the sales of their products on a national scale. [8]

## XXII.

The value of the good will embodied in the name "Big Boy" as the plaintiff's trade-mark and trade name referred to herein greatly exceeds the sum of \$3,000.00, and the conduct of the defendants, unless restrained, will greatly impair, if not destroy, the value of said good will.

## Second Cause of Action

## I.

Plaintiff refers to all of the allegations of plaintiff's first cause of action and by this reference makes them a part hereof.

## II.

For a long time prior to the acts of the defendants herein complained of, they, and each of them, were familiar with the Wian restaurant operation, and well knew of the plaintiff's use and ownership of the "Big Boy" trade-mark and trade name. The defendants' use of the words "Big Boy" in the name of their business, in the names given to their items of manufacture, in their advertisements, and in various other ways, are deliberately calculated and intended to deceive and confuse, and necessarily tend to deceive and confuse, the purchasing public and to lead purchasers and prospective customers to believe, contrary to the fact, that the business of the defendants is associated or affiliated with that of the plaintiff, and that the activities of the defendants are authorized by the plaintiff and that the plaintiff is responsible therefor.

## III.

The effect of the adoption and use by the defendants of the trade-marks of the plaintiff as described herein has been to enable the defendants to appropriate to themselves a portion of the business and good will heretofore enjoyed by the plaintiff and

to cause customers of the plaintiff and the public generally [9] to believe that the defendants and the plaintiffs are one and the same or in some way associated with each other or that the plaintiff has sponsored and approved the defendants' products.

#### IV.

Plaintiff is informed and believes and upon such information and belief alleges that the defendants by their conduct as described herein have deceived the public into the belief that it is purchasing the product of the plaintiff, resulting in the diminution of plaintiff's business and profits, loss of good will and other damage.

#### V.

The plaintiff first learned of the hereinabove-described infringement by the defendants shortly prior to August 21, 1953, and on said date, through its attorneys, the plaintiff gave notice in writing to the defendants with respect to said infringement and demanded that they desist from the practices herein complained of. The defendants, through their attorney, have persistently refused, and still refuse, so to desist, and they are still currently continuing to engage in the practices herein complained of. The plaintiff is informed and believes, and upon such information and belief alleges, that the defendants have profited financially through their unjustified use of the name "Big Boy" as hereinabove alleged. The plaintiff is not presently aware of the extent of such profit, inasmuch as the plaintiff does

not have access to the information upon which a determination of such profit would be based.

### Third Cause of Action

#### I.

Plaintiff refers to paragraphs II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI and XXII of plaintiff's first cause of action and paragraphs II, III, IV and V of plaintiff's second cause of action and by this reference makes [10] them a part hereof.

#### II.

The acts of the defendants as described herein constitute unfair competition. This cause of action is joined with a substantial claim under the Federal trade-mark laws, and the authority for the original jurisdiction of this Court is found in 62 Stat. 931, 28 U.S.C. § 1338 (1948).

Wherefore, the plaintiff prays:

1. That the defendants, and each of them, their servants, agents, attorneys, employees, successors, and assigns and all persons in active concert or participation with them, be restrained permanently by order and injunction of this Court:

(a) From directly or indirectly using in any way whatsoever the name "Big Boy" in any manner intended or calculated to indicate, or having the effect of indicating, that the defendants have any connection with the business of the plaintiff, and

from representing in any manner, by statements, advertising, conduct or otherwise, that the business of the defendants has any connection whatsoever with the business of the plaintiff;

(b) From using the words "Big Boy" in the name of the defendants' business;

(c) From using the words "Big Boy," or any simulation thereof, either alone or as a part of a phrase, on products, in advertising, on letterheads, business cards, telephone directory advertising, statements, signs, or otherwise;

(d) From aiding, abetting, or assisting others in the commission of the aforesaid acts; and

(e) From otherwise competing unfairly with the plaintiff.

2. That the defendants be required to account for the profits that they have made from the sale of all products sold by [11] them under the name and style of "Big Boy" and that judgment be granted to the plaintiff in the amount of such profits.

3. That the plaintiff have such other and further relief as to the Court may seem just, together with costs and disbursements in this action.

GRAY, BINKLEY &  
PFAELZER,

By /s/ WILLIAM P. GRAY,  
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 1, 1954. [12]

[Title of District Court and Cause.]

MOTION TO DISMISS, ETC.

Notice of Motion

To: Gray, Binkley & Pfaelzer, Attorneys for Plaintiff:

Please Take Notice that the undersigned will bring the attached motions on for hearing before the above-entitled court, in the courtroom of the Honorable Harry C. Westover, Judge, in the United States Post Office and Court House Building, Los Angeles, California, on Monday, the 17th day of January, 1955, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel may be heard.

GEORGE B. T. STURR and

ALBERT LEE STEPHENS, JR.,

By /s/ ALBERT LEE STEPHENS, JR.,  
Attorneys for Defendants, L. O. Persinger and  
Merle Persinger. [38]

I.

Motion to Dismiss for Failure to State a Claim  
Upon Which Relief Can Be Granted

Defendants L. O. Persinger and Merle Persinger, pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure, respectfully move the court that the plaintiff's complaint be dismissed upon the ground that the same fails to state a claim upon which relief may be granted.



## II.

Motion to Dismiss the Second Cause of Action and the Third Cause of Action for Lack of Jurisdiction Over the Subject Matter.

Defendants L. O. Persinger and Merle Persinger, pursuant to Rule 12 (b) (1) of the Federal Rules of Civil Procedure, respectfully move the court to dismiss the Second Cause of Action and the Third Cause of Action of plaintiff's complaint on the ground that the court lacks jurisdiction over the subject matter thereof.

## III.

Motion for a More Definite Statement

Defendants L. O. Persinger and Merle Persinger, pursuant to Rule 12 (e) of the Federal Rules of Civil Procedure, respectfully move the court for an order requiring that plaintiff make a more definite statement on the ground that the complaint is vague and ambiguous in the following respects and defendants cannot reasonably be required to frame a responsive pleading thereto. The difficulties complained [39] of and the details desired are as follows:

1. It is not ascertainable from the amended complaint, and particularly from paragraphs V, XI and XII of the allegations contained in the First Cause of Action and as incorporated by reference in the allegations of the Second and Third Causes of Action contained in said amended complaint,

wherein there is reference to "food products," "other food products" and "products";

a. How or in what manner the same are alleged to be related to the double-deck hamburger sandwich referred to in the amended complaint or the design of a stout boy eating a hamburger sandwich; or

b. How the words "Big Boy" are applied in the sale of such food products; or

c. What food products are being sold by plaintiff or its licensees in connection with the words "Big Boy";

d. Whether such food products are being manufactured by plaintiff or its licensees;

e. How or in what manner such food products have been identified with the promotion of Big Boy hamburgers other than being served in a restaurant which serves Big Boy hamburgers.

2. It is not ascertainable from the amended complaint, and particularly paragraph XII of the First Cause of Action alleged therein and as incorporated by reference into the Second and Third Causes of Action alleged therein, how and in what manner the words "Big Boy" have been identified with the businesses of plaintiff and its licensees as distinguished from the sale by plaintiff and its licensees of a hamburger sandwich called "Big Boy," and particularly the amended complaint and each cause of action alleged therein is vague and ambiguous concerning the establishment of any uni-

form quality of services [40] of plaintiff and its licensees.

3. Said amended complaint is further vague and indefinite in that in paragraph XIX of the First Cause of Action alleged therein and as incorporated by reference in the Second and Third Causes of Action, there is reference to “‘Big Boy’ restaurants,” while there is no allegation in the amended complaint or in any cause of action alleged therein that plaintiff or its licensees operate any restaurant by such name; on the contrary, it would appear from the amended complaint that the restaurants of plaintiff and its licensees are otherwise known and designated. See paragraphs V, VIII, IX and XI of the First Cause of Action and as incorporated by reference in the Second and Third Causes of Action alleged in the amended complaint and the exhibits therein referred to.

4. Said amended complaint is vague and indefinite in that there is no allegation of facts showing that the trade-marks of the plaintiff, referred to in paragraph XIII of the First Cause of Action alleged in said amended complaint and as incorporated by reference in the Second and Third Causes of Action alleged therein, were duly or legally or validly issued or are valid or that the use by defendants of the decal referred to in paragraph XV and shown in Exhibit P to the amended complaint is not the use of a valid trade-mark duly registered by defendants prior to registration of plaintiff's trade-marks or either of them.

5. It cannot be ascertained from the amended complaint or from any cause of action alleged therein whether plaintiff contends that the use of the words "Big Boy" has resulted in such words becoming a trade name in Southern California alone, as alleged in paragraph X of the First Cause of Action and as such paragraph is incorporated by reference in [41] the Second and Third Causes of Action alleged in the amended complaint, or in other places in the United States or elsewhere as well, as evidenced by paragraph XII of the First Cause of Action alleged in the amended complaint and as such paragraph is incorporated by reference in the Second and Third Causes of Action alleged in said amended complaint.

6. The amended complaint and each and every cause of action alleged therein is vague and ambiguous with respect to allegations concerning impairment or destruction of the value of the good will alleged to be associated with plaintiff's claimed trade-mark and trade name, particularly paragraph XXII of the First Cause of Action alleged in the amended complaint and as such paragraph is incorporated by reference into the Second and Third Causes of Action alleged in said amended complaint, in that no facts have been alleged in the amended complaint nor in the First, Second and Third Causes of Action designated therein which would indicate how the conduct of defendants, or either of them, has adversely affected, or could adversely affect, the value of the good will claimed

by plaintiff to exist with respect to its alleged trademark and trade name.

The details desired of plaintiff are apparent from the foregoing outline of the difficulties complained of by defendants. It is respectfully submitted that unless said details are furnished by plaintiff a responsive pleading will in effect constitute simply a denial of conclusions of law and that no issues of fact will be framed or indicated by the pleadings and that the subsequent conduct of the case will be difficult, particularly with respect to findings of fact and conclusions of law. [42]

#### IV.

#### Motion to Strike Immaterial Matter From Amended Complaint

Defendants L. O. Persinger and Merle Persinger, pursuant to Rule 12 (f) of the Federal Rules of Civil Procedure, respectfully move the court to strike from the amended complaint, and from the First, Second and Third Causes of Action alleged therein, the following allegations, on the ground that they are immaterial to the issues herein:

1. The allegation in paragraph I of the First Cause of Action and as incorporated by reference in the Second Cause of Action by paragraph I thereof, that the sum or amount involved exceeds \$3,000.00, exclusive of interest.

2. Allegations in paragraphs V, XI and XII of the First Cause of Action of the amended complaint

and as incorporated by reference in the Second Cause of Action by paragraph I thereof and as incorporated by reference in the Third Cause of Action by paragraph I thereof, with respect to "food products," "other food products" and "products."

3. The allegations of paragraph XI of the First Cause of Action of the amended complaint, as incorporated by reference in the Second Cause of Action by paragraph I thereof, and as incorporated by reference in the Third Cause of Action by paragraph I thereof.

4. The allegations of paragraph XIII of the First Cause of Action of said amended complaint and as incorporated by reference in the Second Cause of Action by paragraph I thereof, and as incorporated by reference in the Third Cause of Action by paragraph I thereof, that "On July 15, 1952, there was duly and legally issued to the plaintiff a certificate of registration of the United States Patent Office trade-mark number 561430."

5. The allegations of paragraph XIX of the [43] First Cause of Action and as incorporated by reference in the Second Cause of Action by paragraph I thereof and as incorporated by reference in the Third Cause of Action by paragraph I thereof.

6. The allegations of paragraph XXI of the First Cause of Action of the amended complaint, and as incorporated by reference in the Second Cause of Action by paragraph I thereof and as

incorporated by reference in the Third Cause of Action by paragraph I thereof, that "The defendants advertise their products as 'Made in California—Sold Across the Nation' and the plaintiff is informed and believes, and upon such information and belief alleges, that the defendants are currently attempting further to promote the sales of their products on a national scale."

### Statement of Reasons

The Reasons in Support of the Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted Are as Follows:

1. The plaintiff's alleged trade-mark consists of common non-fanciful words which when used as a trade-mark are "weak" rather than "strong."

2. Even if such words have acquired a secondary meaning with respect to plaintiff's hamburger or other food products, defendants' use of such words as a trade-mark is with respect to non-competing goods which are not similar in any way to plaintiff's goods, are marketed through different channels and to a more discriminating class of consumers, and as a consequence there is little likelihood of confusion of source on the part of purchasers which would result in any damage whatsoever to plaintiff's business, good will or reputation. [44]

3. A claim for unfair competition which is joined with a claim for trade-mark infringement, under the Lanham Trade-Mark Act of July 5, 1946,

15 U.S.C.A., Sections 1051-1127, involves the same essential elements as the claim for unfair competition where plaintiff's and defendant's goods are non-competing, whether such claim of unfair competition be viewed as a cause of action arising under State Law or whether it be viewed as raising a Federal question under the Lanham Trade-Mark Act. In either event, where the goods involved are non-competing, the gist of the action for unfair competition is a likelihood of confusion on the part of consumers, and where the possibility of such confusion is remote or unlikely, the plaintiff is not entitled to relief by way of injunction, damages, recovery of defendant's profits, or otherwise.

The Reasons in Support of the Motion to Dismiss the Second Cause of Action and the Third Cause of Action for Lack of Jurisdiction Over the Subject Matter Are as Follows:

1. The amended complaint fails to state a substantial and related claim for trade-mark infringement under the laws of the United States.

2. When a complaint fails to state a substantial and related claim for trade-mark infringement under the laws of the United States, the Federal District Court is without jurisdiction over a claim for unfair competition which has been joined in the complaint with the claim for trade-mark infringement.

3. The Lanham Trade-Mark Act of July 5, 1946,



does not confer upon the Federal District Court jurisdiction over claims for unfair competition in the absence of the joinder of a substantial and related claim for trade-mark infringement under [45] the trade-mark laws of the United States in an action between citizens and residents of California, nor does it create a new Federal cause of action which may be asserted separately from a substantial and related claim for a trade-mark infringement under the laws of the United States in the absence of diversity of citizenship.

The reason in support of the Motion for a More Definite Statement is as follows:

The allegations of the amended complaint should be statements of fact subject to being controverted in the answer rather than bare conclusions of the pleader based upon inferences. Defendants believe that the amended complaint enlarges upon the development of the double-deck hamburger sandwich, called "Big Boy" in successive stages without additional facts, from Big Boy hamburgers to "those food products," "other food products," "products," " 'Big Boy' restaurants," "the entire Wian restaurant operation" and ultimately to identifying not only the plaintiff and its business, but also the unidentified businesses of its licensees and their products and their "services." A more definite statement of facts is required to enable defendants to intelligently answer and to frame a responsive pleading.

**The Reasons in Support of the Motion to Strike  
Immaterial Matter From Amended Complaint  
Are as Follows:**

1. The allegations sought to be stricken are immaterial to the issues sought to be raised by the amended complaint.

2. The allegation with respect to the amount in controversy in paragraph I of the First Cause of Action and as incorporated by reference in the Second Cause of Action by paragraph I thereof, is immaterial in a suit under the Lanham Trade-Mark Act of July 5, 1946, by virtue of the express provisions [46] of Title 15, U.S.C.A., Section 1121.

3. The allegations in paragraphs V, XI and XII of the First Cause of Action and as incorporated by reference in the Second Cause of Action by paragraph I thereof and as incorporated by reference in the Third Cause of Action by paragraph I thereof, with respect to "food products," "other food products" and "products" are immaterial because the allegations of the amended complaint show that plaintiff's right to the trade-mark or trade name with respect to the words "Big Boy," if they exist at all, exist only with respect to double-deck hamburgers.

4. The allegations of paragraph XI of the First Cause of Action as incorporated by reference in the Second and Third Causes of Action by paragraph I of such Second and Third Causes of Action, are immaterial to said Second and Third Causes of Action for the reason that such causes of action

are grounded in unfair competition and not in trade-mark infringement under the laws of the United States, and therefore any allegations in said Second and Third Causes of Action with respect to interstate commerce are unnecessary and immaterial because such causes of action are based either on State Law or general principles of unfair competition and not on power of Congress to regulate interstate commerce.

5. The allegations of paragraph XIII of the First Cause of Action and as incorporated by reference in the Second Cause of Action by paragraph I thereof and as incorporated by reference in the Third Cause of Action by paragraph I thereof, that "On July 15, 1952, there was duly and legally issued to the plaintiff a certificate of registration of the United States Patent Office trade-mark number 561430" is immaterial because relief or recovery in this action is not predicated upon such trade-mark or name infringement or unfair competition with respect thereto. [47]

6. The allegations of paragraph XIX of the First Cause of Action and as incorporated by reference in the Second Cause of Action by paragraph I thereof and as incorporated by reference in the Third Cause of Action by paragraph I thereof, are immaterial in that plaintiff's amended complaint does not set forth that plaintiff has established a trade-mark or trade name with respect to food products in general nor with respect to those which are mentioned in said paragraph, nor that the

plaintiff has the exclusive right to use the words "Big Boy" with respect to the sale and promotion of food products other than double-deck hamburgers.

7. The allegations sought to be stricken from paragraph XXI of the First Cause of Action and as incorporated by reference in the Second Cause of Action by paragraph I thereof and as incorporated by reference in the Third Cause of Action by paragraph I thereof, are immaterial and unnecessary for the reason that it is not alleged that defendants are not entitled to promote the sale of their products on a national scale and that the defendants are not entitled to advertise their products as "Made in California—Sold Across the Nation"; nor is it alleged that the defendants advertise or promote their products under such name on a national scale. [48]

Respectfully submitted,

GEORGE B. T. STURR and

ALBERT LEE STEPHENS, JR.,

By /s/ ALBERT LEE STEPHENS, JR.,

Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed December 20, 1954. [50]

In the District Court of the United States, Southern  
District of California, Central Division

No. 16,497-HW

ROBERT C. WIAN ENTERPRISES, INC.,  
Plaintiff,

vs.

L. O. PERSINGER and MERLE PERSINGER,  
Individually and as Partners d/b/a Big Boy  
Manufacturing Company; DOE I, DOE II and  
DOE III,

Defendants.

### ORDER OF DISMISSAL

The above-entitled action having been commenced by the filing of a complaint against defendants and an amended complaint having been thereafter filed, and defendants having filed a motion to dismiss the same and said motion having come on regularly to be heard on the 17th and 24th days of January, 1955, the plaintiff being represented by Gray, Binkley & Pfaelzer, William P. Gray, Esq., appearing, and defendants being represented by George B. T. Sturr, Esq., and Albert Lee Stephens, Jr., Esq., Mr. Sturr and Mr. Stephens appearing, and the court having heard the arguments of counsel and having considered the points and authorities submitted in support of and in opposition to said motion, and having granted plaintiff leave to amend and plaintiff [52] having failed and refused to amend its said complaint within ten days from the

date of said hearing (ten days being the time counsel for the respective parties agreed upon as the time to be allowed for amendment thereof), and the court being fully advised in the premises,

Now Therefore, It Is Hereby Ordered, Adjudged and Decreed that the said amended complaint and the action based thereon be, and the same is hereby, dismissed for failure to state a claim upon which relief can be granted.

Dated: Feb. 7th, 1955.

/s/ HARRY C. WESTOVER,  
United States District Judge.

Approved as to form:

GRAY, BINKLEY &  
PFAELZER,

By /s/ MARTIN J. SCHNITZER,  
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed February 7, 1955.

Judgment docketed and entered February 8, [53]  
1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Defendants, L. O. Persinger and Merle Persinger, and Their Attorneys, George B. T. Sturr and Albert Lee Stephens, Jr.:

Notice is hereby given that Robert C. Wian Enterprises, Inc., the above-named plaintiff, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order of dismissal entered herein on February 8, 1955.

Dated: March 4, 1955.

GRAY, BINKLEY &  
PFAELZER,

By /s/ MARTIN J. SCHNITZER,  
Attorneys for Plaintiff-  
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 7, 1955. [54]

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[Title of District Court and Cause.]

STATEMENT OF POINT RELIED  
UPON ON APPEAL

Plaintiff herein intends to rely upon the following point in prosecuting its appeal from the Order of Dismissal entered in favor of the defendants herein:

1. The Court erred in granting the defendants' motion for an order of dismissal and in making said order.

Dated: March 18, 1955.

GRAY, BINKLEY &  
PFAELZER,

By /s/ MARTIN J. SCHNITZER,  
Attorneys for Plaintiff-  
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 21, 1955. [56]

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In the United States District Court, Southern  
District of California, Central Division

No. 16497-HW Civil

ROBERT C. WIAN ENTERPRISES, INC.,  
Plaintiff,

vs.

L. O. PERSINGER and MERLE PERSINGER,  
Etc., Et Al.,

Defendants.

Honorable Harry C. Westover, Judge Presiding.

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Los Angeles, California



Appearances:

For the Plaintiff:

GRAY, BINKLEY & PFAELZER, by  
WILLIAM P. GRAY, ESQ.

For the Defendants:

ALBERT LEE STEPHENS, JR., ESQ.

January 24, 1955—10:00 A.M.

The Clerk: No. 16497, Robert C. Wian Enterprises vs. L. O. Persinger, et al.

The Court: I do not know whether it is necessary to reargue this matter or not since last Monday I reread all the cases as to the law in this state and this Circuit, and unless you have some recent authorities, some new authorities, that I have not seen, I do not think it has to be reargued.

Mr. Stephens: No, your Honor. We simply wanted additional time to be able to present to your Honor with the memorandum in response to the respondent's memorandum.

The Court: I do not know if it is necessary to grant any additional time. This is not a new subject at all, this is just going over the same thing.

Mr. Stephens: I am not asking for additional time now, your Honor. I mean that is the reason we wanted the additional week.

The Court: Very well.

Mr. Gray: If the court please, we did argue this quite fully last week. I am not quite sure, as I look back upon it, that I made our position quite clear

in embracing the Sunbeam cases, which I did, and still do, and at the risk of persuading the court against the position in our favor, I would like to just make a couple of comments if the court [2\*] would care to hear them.

The Court: I know, but there is really only one issue in this case. Your complaint sets up many things that I do not think have anything to do with the case. I do not think there are any aggravations here and your complaint does not show any violation of the trade-mark.

Mr. Gray: As far as the design is concerned.

The Court: As far as the design is concerned. So the only thing here is the trade name and the trade you are talking about is Big Boy.

Mr. Gray: That is right.

The Court: And that is all.

Now in this State the rule is that by getting a preferred right, let us assume that you have a preferred right, of a name you cannot exclude everybody from using that name in unrelated businesses.

Mr. Gray: That is true, your Honor.

The Court: So now the only issue in this case is the relation of the restaurant business to the manufacturing business, and that is all.

Mr. Gray: Not quite, your Honor, please. It is the relation of the restaurant business to the business of manufacturing a particular thing that you make, an item of food.

In other words, the touchstone is a hamburger. That is contrary to the Sunbeam case. [3]

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: You do not claim any exclusive right to a hamburger, do you?

Mr. Gray: No, if your Honor please, but if you have traveled up on Highway 101, as you undoubtedly have, perhaps you have stopped at Buellton, halfway up the Coast, and partaken of Andersen's split-pea soup, which was there for years, and if you haven't done so I would commend it to you. But there was just a restaurant business.

Now you wouldn't suppose, however, that if somebody else should go into the business of packaging and freezing split-pea soup for home consumption and calling it Andersen's that there wouldn't be any likelihood of confusion.

The Court: That is right. But you have a manufacturing business here; you are not selling food.

Mr. Gray: I can't cover all things by one illustration.

On the other hand, your Honor, you do have two different businesses. One is a restaurant business, as you have said, and the other is a business of—well, a grocery business, if you please. Now they are distinct businesses.

Now supposing that this other person instead of packaging frozen food would develop a nice tureen to accommodate split-pea soup and would emblazon "Andersen's Split-Pea Soup Tureen" on it. Now that is your case.

It seems to me, if your Honor please, that you would not say then that there was no reasonable possibility of [4] confusion in that situation.

The Court: You may have a cause here of com-

petition, but that is a State issue. We have no jurisdiction unless we can establish in some way that there has been a violation of a trade-mark or a trade name.

Mr. Gray: There is some confusion, as I understand it, even with respect to that problem, your Honor. But, if I may point out, there is nothing in any of these cases that says that the relationship here is too remote. In the Sunbeam cases you have a fluorescent lamp as opposed to a home appliance. They enjoined the lamp, the actual table lamp, in that case.

The Court: Supposing I go out and manufacture a skillet and call it the Big Boy skillet. Can you stop me from manufacturing the skillet?

Mr. Gray: I will have to decide that case when it comes. I probably would try. But I wouldn't be as confident as I am of this one, if your Honor please.

Actually, although there is no requirement of competition in effect, if we wanted to argue the point from a strictly logical standpoint I suppose there is competition here. If a person is hungry for a hamburger he has two choices: one is to go down to our place and buy one, and the other is to make it himself. If he makes it himself, he provides the meat. If he is going to buy it at the store, it is [5] ours.

I don't like to labor the point. Of course the Time case doesn't help or hurt anybody. There Judge Mathes said clearly that the word "Time" is descriptive both of the plaintiff's magazine, the

timeliness of news, and also the defendant's transportation company, we get things there on time. In the other sense there is no relationship at all between the "time" on Time Magazine and a transportation business.

In our case that isn't so. They are both dealing with exactly the product that we have built up and given to our name.

I know I have said that so many times that it is redundant, but that is the thing about which we feel so strongly.

We go back to Judge Hand's comment that even though there is not necessarily competition, a person's trade-mark is his seal and anybody else that uses it for his own advantage takes something away from the owner of that trade-mark, even though he doesn't tarnish the reputation.

We think that particularly in this area that the term Big Boy connotes two things: first, Big Boy hamburgers and, second, meat products of a high quality, in other words, hamburgers of high quality.

The Court: If the defendants here were attempting to [6] establish a restaurant, I would go along with you, but they are not.

Mr. Gray: No, your Honor. They are establishing various home restaurants, you might say.

Another thing, too, if your Honor please, we have alleged and we will show that this copying was intentional.

The Court: Well, now, supposing that it was. Do we have any jurisdiction to go into that matter?

Mr. Gray: Not if the thing is too remote to con-

stitute a trade-mark infringement, but the cases are—and I neglected to cite some but I have read many cases—to the effect that if you have an intentional copying then the inclination of the court is not to be so restrictive in its determination of what constitutes a violation. A person who does a copying innocently, without knowledge of the other person's mark, is entitled to much more consideration and much more credit than one who is not doing it innocently.

The Court: If you want to, you can file an action in the Superior Court against the defendants for unfair competition and then you can show in that action that they have deliberately copied the name Big Boy and that they are unfairly competing with you. Now that could be shown here provided we had jurisdiction of either the copyright or the trade name.

Mr. Gray: We are aware of that. In fact, I think it is [7] debatable as to whether or not the Federal court has such jurisdiction in the absence of a trade-mark violation. We were aware of that when we brought our action. We do feel that you do have a trade-mark problem here, and even in the absence of that you have jurisdiction even if you didn't have, but we are not relying on unfair competition, we are relying on a trade-mark violation because of the relationship that exists here far closer than the Sunbeam case or the Time case.

The Court: I do not think the relationship is close enough. Consequently I will grant the motion to dismiss, with leave to file an amended complaint

if you so desire, and if you can file an amended complaint showing that there is a closer relationship. But I do not think that you have established your right in the food industry, in the restaurant business, so that you can carry over that right into a manufacturing business.

Mr. Gray: Even though the manufacture is related to the same product?

The Court: I do not think so. So the motion is granted. And will you prepare the order?

Mr. Gray: I trust you were looking at Mr. Stephens, your Honor.

The Court: I was.

Mr. Stephens: I will, your Honor. [8]

The Court: And without prejudice to filing an amended complaint.

Mr. Stephens: Very well.

[Endorsed]: Filed March 21, 1955. [9]

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered 1 to 59, inclusive, contain the original:

Amended Complaint for Injunctive Relief and Damages.

Notice of Motion, Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, etc.

Order of Dismissal.

Notice of Appeal.

Statement of Point Relied Upon on Appeal.

Designation of Record on Appeal.

which, together with 2 volumes of Reporter's Transcript of Proceedings held on Jan. 17 and 24, 1955, in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals in said cause.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 11th day of April, 1955.

[Seal]

EDMUND L. SMITH,  
Clerk;

By /s/ THEODORE HOCKE,  
Chief Deputy.



[Endorsed]: No. 14723. United States Court of Appeals for the Ninth Circuit. Robert C. Wian Enterprises, Inc., a Corporation, Appellant, vs. L. O. Persinger and Merle Persinger, Individually and as Partners, Doing Business as Big Boy Manufacturing Company, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 12, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

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United States Court of Appeals  
for the Ninth Circuit

No. 14723

ROBERT C. WIAN ENTERPRISES, INC.,  
Appellant,

vs.

L. O. PERSINGER and MERLE PERSINGER,  
Individually and as Partners, Doing Business  
as Big Boy Manufacturing Company,  
Respondents.

APPELLANT'S STATEMENT OF POINTS  
AND DESIGNATION OF RECORD

The appellant hereby adopts as its statement of points to be relied on and designation of record the "Statement of Point Relied Upon on Appeal" and "Designation of Record on Appeal" heretofore filed

with the District Court of the United States, Southern District of California, and contained in the type-written transcript of record filed herein.

Dated: April 14, 1955.

GRAY, BINKLEY &  
PFAELZER,

By /s/ MARTIN J. SCHNITZER,  
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 16, 1955.

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[Title of Court of Appeals and Cause.]

### STIPULATION RE EXHIBITS

It is hereby stipulated by and between the parties to the above-entitled action through their respective counsel that the exhibits attached to the original record as transmitted to the above-entitled court may be considered by said court without being reproduced in the printed record on appeal.

Dated: May 18, 1955.

GRAY, BINKLEY &  
PFAELZER,

By /s/ MARTIN J. SCHNITZER,  
Attorneys for Appellant.

ALBERT LEE STEPHENS, JR.,

By /s/ ALBERT LEE STEPHENS, JR.,  
Attorney for Respondents.

[Endorsed]: Filed May 20, 1955.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

ROBERT C. WIAN ENTERPRISES, INC., a Corporation,  
*Appellant,*

*vs.*

L. O. PERSINGER and MERLE PERSINGER, Individually and  
as Partners, Doing Business as Big Boy Manufacturing  
Company,

*Appellees.*

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## APPELLANT'S OPENING BRIEF.

---

GRAY, BINKLEY & PFAELZER,  
WILLIAM P. GRAY and  
MARTIN J. SCHNITZER,  
458 South Spring Street,  
Los Angeles 13, California,  
*Attorneys for Appellant.*

FILED

AUG 13 1955

PAUL P. O'BRIEN, CLERK



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No. 14723

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

ROBERT C. WIAN ENTERPRISES, INC., a Corporation,  
*Appellant,*

*vs.*

L. O. PERSINGER and MERLE PERSINGER, Individually and  
as Partners, Doing Business as Big Boy Manufacturing  
Company,

*Appellees.*

---

## APPELLANT'S OPENING BRIEF.

---

### I.

Statement of the Facts Setting Forth the Basis for  
the Jurisdiction of the District Court and the  
Jurisdiction of the Court of Appeals.

#### A. District Court.

The Amended Complaint for Injunctive Relief and  
Damages [Tr. Rec. p. 3] in its first cause of action  
sets forth a claim for trademark infringement. The  
authority for the jurisdiction of the District Court in  
such a case is found in 60 Stat. 440, 15 U. S. C. Sec. 1121  
(1946), which confers upon the District Court juris-  
diction in all actions arising under the Federal trademark  
laws. The second cause of action also sets forth a cause

of action for trademark infringement, and the Court's jurisdiction is predicated upon the same statute.

The third cause of action is based upon unfair competition. The authority for the jurisdiction of the District Court in such cases is found in 62 Stat. 931, 28 U. S. C. Sec. 1338 (1948). This statute is divided into two sections. Section (a) confers jurisdiction upon the District Court in "any civil action arising under any Act of Congress relating to patents, copyrights and trademarks." Section (b) confers jurisdiction on the District Court in any action asserting a claim of unfair competition when that action is joined with a substantial and related claim under the trademark laws. The action for unfair competition set forth in the plaintiff's third cause of action would fall within the provisions of Section (b), since it is joined with the action for trademark infringement set forth in the first and second causes of action. Even assuming that this Court were to hold that the first and second causes of action do not set forth claims for trademark infringement, the District Court would nevertheless have jurisdiction over the third cause of action under Section (a).

*Stauffer v. Exley*, 184 F. 2d 962 (9th Cir. 1950);  
*Time, Inc. v. T.I.M.E., Inc.*, 123 Fed. Supp. 446  
(S. D. Cal. 1954).

#### **B. Jurisdiction of Court of Appeals.**

The jurisdiction of the Court of Appeals is founded upon 62 Stat. 929, 28 U. S. C. Sec. 1291 (1948), which confers upon the Court of Appeals jurisdiction of appeals from all final decisions of the District Courts of the United States and upon 60 Stat. 440, 15 U. S. C. Sec. 1121 (1946), which gives to the Court of Appeals appel-

late jurisdiction in all matters arising under the Federal trademark laws. The Notice of Appeal [Tr. Rec. p. 31] sets forth that this appeal is from the Order of Dismissal entered on February 8, 1955. This Order of Dismissal [Tr. Rec. p. 29] states that the District Court orders that the Amended Complaint and the action based thereon be dismissed for failure to state a claim upon which relief can be granted. Such an order constitutes a final judgment and is therefore an appealable order within the meaning of 62 Stat. 929, 28 U. S. C. Sec. 1291 (1948).

*Wright v. Gibson*, 128 F. 2d 865 (9th Cir. 1942);  
*United States v. State of Arizona*, 206 F. 2d 159 (9th Cir. 1953).

## II.

### Statement of the Case.

This appeal arises on the Amended Complaint for Injunctive Relief and Damages, the defendants' Motion to Dismiss, and the Order made pursuant thereto. The first cause of action of the Amended Complaint sets forth the following facts:

The plaintiff is a corporation engaged in the restaurant business. Its predecessor, Robert C. Wian, first entered the restaurant business in 1936 in Glendale, California, where he operated a single restaurant under the business name and style of "Bob's". In 1938 he developed what is now known as a "double deck" hamburger which he began selling and serving under the trade name "Big Boy". At the same time, he created a distinctive design consisting of a stout boy in overalls holding a hamburger sandwich, which design was used in conjunction with the trade name. [Tr. Rec. p. 4, par. V.]

In 1946 the plaintiff corporation was formed and succeeded to the business developed by Mr. Wian. The plaintiff continued to use the name "Big Boy" and the design of the fat boy so that both the name and the design have now been in continuous use since 1938. [Tr. Rec. p. 5, par. VI.]

The plaintiff's operation has been expanded to include ten restaurants in Southern California and, during the year 1953, served two million (2,000,000) customers and received gross receipts in excess of Three Million Five Hundred Thousand Dollars (\$3,500,000). In order to publicize and promote the name "Big Boy" and the design, the plaintiff has caused them to be widely advertised in Southern California. Examples of the advertising were attached to the complaint as Exhibits "A" through "L" and include, among other things, hamburger bags, billboards, business cards and stationery. The plaintiff has also advertised through newspapers, radio programs and other customary media of advertising. [Tr. Rec. p. 5, pars. VII, VIII and IX.]

As a result of the plaintiff's efforts, the words "Big Boy" and the accompanying design have become widely recognized in Southern California as identifying the plaintiff's restaurant operation, and "Big Boy" has thereby become the plaintiff's trade name as well as trademark. [Tr. Rec. p. 7, par. X.]

In addition to its own operations in the Southern California area, the plaintiff has in the past few years undertaken a program looking to the establishment of licensee operated restaurants throughout the United States which display and advertise the "Big Boy" trademark and design and serve "Big Boy"

hamburgers according to standards established and enforced by the plaintiff. At the time of the filing of the Amended Complaint, such licenses had been granted in Illinois, Ohio, Kentucky, West Virginia and Michigan. A photograph of the restaurant of one of the licensees is Exhibit "M" of the Amended Complaint. As a result of the efforts of the plaintiff and its licensees, the plaintiff's trademark and design are now widely recognized throughout a large part of the United States as identifying the businesses and products of the plaintiff and its licensees. [Tr. Rec. p. 7, pars. XI and XII.]

The plaintiff in the years 1952 and 1953 registered its name and design as trademarks in the United States Patent Office, and copies of the registration certificates were attached to the Amended Complaint as Exhibits "N" and "O". [Tr. Rec. p. 9, par. XIII.]

Beginning sometime after 1950, the defendants as partners commenced manufacturing and selling at wholesale and retail various types of home barbecues, braziers and related accessories. They gave to their business the name "Big Boy Manufacturing Company" and advertised their products under the name "Big Boy", and they are still so advertising. [Tr. Rec. p. 9, par. XIV.]

Examples of the defendants' advertising material were attached to the Amended Complaint as Exhibits "P", "Q" and "R". These include a picture in the defendants' advertising material displaying a sign on the roof of what purports to be the defendants' factory bearing the words "Home of Big Boy

Barbecues" in the same manner as the Wian restaurants are designated "Home of the Big Boy Hamburger." The advertisements include pictures of food products similar to those sold in the plaintiff's restaurants. [Tr. Rec. p. 9, pars. XV, XVI, XVII, XVIII, XIX and XX.]

The defendants have caused their products to be advertised and sold in the Southern California area as well as in other states across the nation. [Tr. Rec. p. 11, par. XXI.]

The defendants' conduct unless restrained will impair, if not destroy, the value of plaintiff's good will. [Tr. Rec. p. 11, par. XXII.]

In addition to the facts set forth above, the plaintiff alleged in its second cause of action the following:

The acts of the defendants in adopting the name "Big Boy" and in taking the steps described were done with the knowledge of the plaintiff's business and with the knowledge of the plaintiff's use and ownership of the "Big Boy" name and the accompanying design. The defendants' actions necessarily tended to confuse and deceive the purchasing public and were deliberately intended to confuse and deceive the purchasing public into believing that the defendants' business was in some way associated with or affiliated with that of the plaintiff or that the defendants' activities were authorized by the plaintiff. [Tr. Rec. p. 12, par. II.]

As a result, the defendants have appropriated to themselves a portion of the business and good will of the plaintiff and have caused the plaintiff's customers and the public generally to believe that the



plaintiff and the defendants are one and the same or in some way associated with each other. They have caused a diminution of the plaintiff's business and profits and a loss of the plaintiff's good will. [Tr. Rec. p. 13, pars. III and IV.]

On August 21, 1953, shortly after learning of the defendants' conduct, the plaintiff gave notice to the defendants with respect to their infringements and demanded that they desist from the practices described. This, however, the defendants have persistently refused to do. [Tr. Rec. p. 13, par. V.]

The plaintiff's third cause of action incorporates the facts contained in the first and second causes of action but states that it is for unfair competition rather than trademark infringement. [Tr. Rec. p. 14, par. I.]

The defendants in response to the plaintiff's Amended Complaint filed their Motion to Dismiss, Motion for a More Definite Statement and Motion to Strike. [Tr. Rec. p. 16.] The matter was argued before the District Court which indicated during the course of that argument that it did not feel that the plaintiff had set forth or could set forth a cause of action for trademark infringement or unfair competition due to the dissimilarity of the businesses of the parties. [Tr. Rec. pp. 36, 37.] Nevertheless, the Court granted to the plaintiff leave to file a Second Amended Complaint showing a closer relationship between the two businesses. [Tr. Rec. p. 38.] This the plaintiff declined to do, and the Court thereupon entered its Order of Dismissal dismissing the plaintiff's Amended Complaint and the action based thereon on the ground that the plaintiff had failed to state a claim upon which relief could be granted. No action was taken upon

the Motion for a More Definite Statement or upon the Motion to Strike. [Tr. Rec. p. 29.]

This appeal therefore presents only the question of whether or not the plaintiff has stated in its Amended Complaint any claim upon which relief might be granted by the District Court.

### III.

#### **Specification of Errors.**

The appellant contends that the Court erred in granting the Motion to Dismiss and in dismissing the plaintiff's Amended Complaint for the reason that the plaintiff's Amended Complaint sets forth facts constituting a claim for both trademark infringement and unfair competition.

### IV.

#### **Summary of Argument.**

Trademark infringement as defined by statute (60 Stat. 437, 15 U. S. C. sec. 1114 (1946), see Appendix) consists of the following elements:

1. Reproduction or imitation of the registered trademark of another in connection with the sale or offer for sale of goods or services by the person making the reproduction or imitation.
2. Use of such a reproduction or imitation in interstate commerce.
3. Use of such a reproduction or imitation without the consent of the registrant.
4. Use of such a reproduction or imitation in a manner likely to cause confusion or to deceive purchasers as to the origin of goods or services.

Unfair competition in the context of the present case contains many of the same elements. It does not, however, require a registered trademark. It does require the existence of a secondary meaning for the plaintiff's trade name, a likelihood of confusion and an intent upon the part of the defendants to create confusion or to deceive the public. "Unfair competition" is actually a misnomer since competition is not an essential element. The distinctions between the two causes of action are described in *Brooks Bros. v. Brooks Clothing of California*, 60 Fed. Supp. 442 (S. D. Cal. 1945), opinion adopted in *Brooks Clothing of California v. Brooks Bros.*, 158 F. 2d 798 (9th Cir. 1947).

Since the present appeal arises on a dismissal pursuant to the granting of a Motion to Dismiss, all of the allegations of the plaintiff's complaint must be deemed to be true, and the only question to be considered is whether or not the plaintiff has alleged in its Amended Complaint all of the elements necessary to state a claim upon which relief can be granted. An examination of the plaintiff's complaint discloses allegations of the following:

1. Reproduction of the registered mark of the plaintiff by the defendants in connection with the offer for sale or sale of goods by the defendants. [Tr. Rec. p. 14, pars. XIV-XXI.]
2. Use of the reproduction by the defendants in interstate commerce. [Tr. Rec. p. 7, pars. XI, XII; p. 11, par. XXI.]
3. Use of the reproduction by the defendants without the plaintiff's consent. [Tr. Rec. p. 13, par. V.]
4. Intention on the part of the defendants to confuse or deceive the public. [Tr. Rec. p. 12, par. II.]

5. Likelihood of confusion and actual confusion and deception as a result of the defendants' conduct. [Tr. Rec. p. 12, pars. II-IV.]
6. Secondary meaning in connection with the trademark and trade name of the plaintiff. [Tr. Rec. p. 8, par. XII.]

There are, therefore, allegations relating to each of the necessary elements of both trademark infringement and unfair competition.

The District Court ruled that a likelihood of confusion was not possible and disregarded the allegations of the plaintiff's complaint setting forth that both likelihood of confusion and confusion itself existed. The question of confusion or likelihood of confusion is one of fact which cannot be determined on a Motion to Dismiss. Even assuming, however, that it is not a question of fact but one of law, it cannot be held that a likelihood of confusion cannot exist in the present case. The plaintiff is the owner of a strong mark which is entitled to the broadest possible protection, and an examination of the cases discloses that protection has been granted where the products involved were far more disassociated than those in this case.

Furthermore, it has been alleged that the infringement by the defendants was committed intentionally. The existence of such an intention, by itself, raises a presumption and constitutes evidence of a likelihood of confusion.

V.

**In Considering an Appeal From a Judgment Pursuant to the Granting of a Motion to Dismiss, the Court Must Regard as True All of the Well Pledged Allegations of the Plaintiff's Complaint.**

This rule was succinctly stated by this court in *Karseal Corporation v. Richfield Oil Corporation*, 221 F. 2d 358 (9th Cir. 1955), in the following language:

“Since this appeal arises from the granting of a Motion to Dismiss, we must take as true all the facts which are well pleaded in the Amended Complaint.”

See also:

*Cerritos Gun Club v. Hall*, 96 F. 2d 620 (9th Cir. 1938);

*Moore v. Garraguez*, 83 F. 2d 139 (9th Cir. 1936);

*United States v. Central Stockholders' Corporation*, 52 F. 2d 322 (9th Cir. 1931).

It is to be noted that the court made no ruling on the motions by the defendants relating to the form of the plaintiff's allegations. It must be assumed then that only their substance is now drawn into question; and as to substance, they must be accepted as true.

VI.

**The Existence of Confusion or a Likelihood of Confusion Must Be Determined as a Question of Fact.**

The application of this rule is brought out in *John Walker & Sons v. Tampa Cigar Co.*, 197 F. 2d 72 (5th Cir. 1952). In that case the plaintiff, the manufacturer of Johnnie Walker Scotch whiskey, brought an action against the defendant for manufacturing and selling cigars under the name "Johnnie Walker". The defendant filed a Motion to Dismiss for failure to state a claim upon which relief might be granted on the ground that it appeared from the plaintiff's Complaint that the products involved were not competitive and that, therefore, there could be no likelihood of confusion.

The District Court granted the motion. The Court of Appeals reversed holding that the question of likelihood of confusion was one of fact saying, at page 73:

"This court and others have frequently laid down the rule that in considering a motion to dismiss the allegations of the complaint must be viewed in a light most favorable to the plaintiff, and all facts well pleaded must be admitted and accepted as true. *Cromelin v. United States*, 5 Cir., 177 F. 2d 275; *Hilliard v. Brown*, 5 Cir., 170 F. 2d 397; *Rose v. Rose*, 5 Cir., 162 F. 2d 587; *Knox v. Ingalls Shipbuilding Corporation*, 5 Cir., 158 F. 2d 973; *Mitchell v. Wright*, 5 Cir., 154 F. 2d 924.

"In the light of these principles, we think it clear that the court below erred in dismissing the complaint. We are in no doubt that the complaint states a claim upon which relief could be granted. The argument that the public is not apt to believe that Johnnie Walker whiskey and Johnnie Walker cigars have a common source of origin and that it has not

taken the trademark Johnnie Walker with the intention of trading on the good will of the plaintiff's trademark, overlooks the point that the motion to dismiss accepts as true all facts well pleaded and, indeed, exemplifies the necessity for a trial in this case. Certain it is this suit for trademark infringement may not be dismissed on motion where there is presented a factual issue as to whether defendant's use of the name Johnnie Walker is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods."

On retrial, the District Court found that a likelihood of confusion did in fact exist and granted the relief prayed for by the plaintiff.

*John Walker & Sons v. Tampa Cigar Company*,  
124 Fed. Supp. 254 (S. D. Fla. 1954).

It has been held on other occasions that the question of likelihood of confusion is one of fact to be decided on the merits.

*Pure Foods v. Minute Maid Corp.*, 214 F. 2d 792  
(5th Cir. 1954);

*Q-Tips v. Johnson & Johnson*, 206 F. 2d 144 (3rd  
Cir. 1953);

*Chappell v. Goltsman*, 186 F. 2d 215 (5th Cir.  
1950).

In the *Q-Tips* case, the court quotes the following from Restatement, Torts, Section 728:

"The issue of confusing similarity is an issue of fact as to the probable or actual reactions of purchasers."

Such an issue cannot, of course, be determined on the pleadings.

VII.

**The Plaintiff's Trademark "Big Boy" in Its Application to the Plaintiff's Business Is a Fanciful or Strong Trademark and Is Therefore Entitled to the Broadest Protection.**

The distinction between weak trademarks and strong trademarks has been discussed in several cases.

*Dwinnel-Wright Co. v. National Fruit Products Co.*, 140 F. 2d 618 (1st Cir. 1944);

*Arrow Distilleries, Inc. v. Globe Brewing Co.*, 117 F. 2d 347 (4th Cir. 1941);

*Palmer v. Gulf Publishing Co.*, 79 Fed. Supp. 731 (S. D. Cal. 1948).

In the *Arrow Distilleries* case, the court points out that the adoption of an arbitrary, fanciful or distinctive name, such as Aunt Jemina, Kodak or Rolls Royce, creates a monopoly of use in a very wide field. However, the adoption of a weak mark, such as Gold Medal, Blue Ribbon or Buckeye, confers protection in only a narrow field.

Weak marks are of two classes—those that are weak because of their common use and those that are weak because they are merely descriptive of the product or service which they designate. Among the former are "College Humor" as applied to a humor magazine (*Collegiate World Publishing Co. v. DuPont Publishing Co.*, 14 F. 2d 158 (N. D. Ill. 1926)), or "American Automobile Association" as applied to an automobile club



(*American Automobile Association v. American Automobile Owners Association*, 216 Cal. 125 (1932)). Examples of the latter type are "Majestic" (*Majestic Manufacturing Co. v. Majestic Electric Appliance Co.*, 172 F. 2d 862 (6th Cir. 1949)), or "Uncle Sam" (*Durable Toy & Novelty Corporation v. J. Chein & Co.*, 133 F. 2d 853 (2d Cir. 1943)).

Strong marks, on the other hand, consist of fabricated words which are totally unique or ordinary English words used in a unique, fanciful or non-descriptive manner. Among the first of these are "Kodak" as applied to cameras or "Nujol" as applied to mineral oil. (*Standard Oil Company v. California Peach & Fig Growers*, 28 F. 2d 283 (D. Del., 1928).) Among the latter is "Stork Club" as applied to a restaurant. (*Stork Restaurant v. Sahati*, 166 F. 2d 348 (9th Cir., 1948).)

The name "Big Boy" as applied to either a restaurant or a hamburger would appear to be in the same class with a name such as "Stork Club." Although it consists of ordinary English words, its application is entirely fanciful. Except for its suggestion of size, it is in no way related to either restaurants or hamburger sandwiches. It is, therefore, entitled to the broad protection of a strong mark.

VIII.

**Actual Competition Between the Products of the Plaintiff and the Products of the Defendant Is Not Essential for Relief in Either Trademark Infringement or Unfair Competition.**

As has been indicated above, it is not essential to a claim for either trademark infringement or unfair competition that the products of the plaintiff and the defendant be in actual competition with each other. In each of the following cases, an injunction was granted even though the product of the plaintiff was totally different from that of the defendant. Following each citation, the plaintiff's product is listed before that of the defendant.

*Sears, Roebuck and Co. v. Johnson*, 219 F. 2d 590 (3rd Cir. 1955)—Automobile accessories and liability insurance v. Driving school;

*Hanson v. Triangle Publications*, 163 F. 2d 74 (8th Cir. 1947)—Magazines v. teenage clothes for girls;

*California Fruit Growers Exchange v. Windsor Beverages*, 118 F. 2d 149 (7th Cir. 1941)—Fruit products v. carbonated drinks;

*S. C. Johnson & Son v. Johnson*, 116 F. 2d 427 (2nd Cir. 1940)—Cleaning fluid v. floor wax;

*L. E. Waterman Co. v. Gordon*, 72 F. 2d 272 (2nd Cir. 1934)—Fountain pens v. razor blades;

*Armour & Co. v. Master Tire & Rubber Co.*, 34 F. 2d 201 (S. D. Ohio, 1925)—Meat packing with incidental production of motorists' supplies v. tires;

*Yale Electric Corporation v. Robertson*, 26 F. 2d 972 (2nd Cir. 1928)—Locks and hardware v. flashlights;

*Wall v. Rolls-Royce of America, Inc.*, 4 F. 2d 333 (3rd Cir. 1925)—Automobiles and airplanes v. radio tubes;

*Elder Manufacturing Co. v. Martin Trenkle Co., Inc.*, 90 Fed. Supp. 889 (E. D. Ark. 1950)—Boys' clothing and toys v. paint;

*Atlas Diesel Engine Corporation v. Atlas Diesel School, Inc.*, 60 Fed. Supp. 429 (E. D. Mo. 1945)—Diesel equipment v. trade school;

*Lady Esther, Ltd. v. Flanzbaum*, 44 Fed. Supp. 666 (R. I. 1942)—Cosmetics v. shoes;

*Esquire, Inc. v. Esquire Bar*, 37 Fed. Supp. 875 (S. D. Fla. 1941)—Magazine v. establishment selling food and drink;

*Alfred Dunhill of London v. Dunhill Shirt Shop*, 3 Fed. Supp. 487 (S. D. N. Y. 1929)—Smoking supplies v. haberdashery.

In the present case, the relationship between the products of the parties is actually much closer than were the relationships in many of the above cited cases. The plaintiff sells hamburgers directly to the consumer; the defendants urge the consumer to "buy our barbecues and prepare your own hamburgers." In both instances, the touchstone is the "hamburger." It is, of course, impossible finally to adjudicate the rights of the parties without examining the facts involved. However, the complaint in this action alleges that the defendants' manner of operation has caused the public to confuse their

product with those of the plaintiff, and the above cited cases indicate that there is no inherent reason why the law may not recognize that such confusion exists.

It appears from the record that the District Judge felt that, irrespective of the foregoing, the plaintiff, being in the "restaurant business" was not entitled to relief because the defendants were in the "manufacturing business" [Tr. Rec. pp. 34-39]. We believe that where, as here, a real likelihood of confusion exists, the law does not require a denial of relief simply because one of the parties is in the manufacturing business and the other is not. It is to be noted that in one of the cases cited above and upon which we rely (*Sears, Roebuck and Co. v. Johnson*, 219 F. 2d 590 (3rd Cir. 1955)), one of the parties was in the merchandising business and the other was conducting a driving school; in another (*Atlas Diesel Engine Corporation v. Atlas Diesel School, Inc.*, 60 Fed. Supp. 429 (E. D. Mo. 1945)), one of the parties was in the manufacturing business and the other was operating a trade school; in a third (*Hanson v. Triangle Publications*, 163 F. 2d 74 (8th Cir. 1947)), one of the parties published a magazine and the other was in the dress manufacturing business; and in a fourth case (*Esquire, Inc. v. Esquire Bar*, 37 Fed. Supp. 875 (S. D. Fla. 1941)), one of the parties published a magazine while the other was in the restaurant business.

IX.

**There Is Nothing in the Sunbeam Cases to Preclude the District Court From Finding Confusion or Likelihood of Confusion in This Case.**

At the hearing before the District Court the defendant appeared to rely substantially upon the so-called *Sunbeam* cases.

*Sunbeam Lighting Co. v. Sunbeam Corp.*, 183 F. 2d 969 (9th Cir. 1950);

*Sunbeam Furniture Corp. v. Sunbeam Corp.*, 191 F. 2d 141 (9th Cir. 1951).

The first of these cases was an action by the manufacturer of electrical home appliances against a partnership manufacturing fluorescent electrical fixtures and portable fluorescent lamps. The defendants had adopted the name "Sunbeam" which was the trademark of the plaintiff. They had also used, in conjunction with the name "Sunbeam," the word "Master" which was also used by the plaintiff, and had adopted a form of printing using a capital "S" somewhat similar to the plaintiff's. The portable lamps manufactured by the defendants were sold in retail stores by methods similar to those used by the plaintiff, whereas, the fluorescent fixtures were sold only to architects and other professional buyers.

The District Court had granted the plaintiff an injunction enjoining the defendants from using the word "Sunbeam" in any way in connection with its business. The Court of Appeals reversed the District Court in part, limiting the injunction to the use of the word "Sunbeam"

in connection with the sale of portable lamps and enjoining *in toto* the use of the word "Sunbeam" in script similar to that used by the plaintiff. The Court held that, so far as the sale of fluorescent fixtures was concerned, there could be no confusion between the products of the plaintiff and the fixtures of the defendants.

The *Sunbeam Lighting Co.* case differs from the present case in several important respects. In the *Sunbeam* case, the Court points out that the differences in marketing make confusion impossible. Only engineers and architects would be purchasing the fixtures of the defendants, and such purchasers are not subject to the confusion which might arise among the public generally. Where such confusion would be possible, in the case of the portable lamps which the Court states are sold as household utensils, the Court was willing to grant the injunction. Of particular significance is the action of the Court in enjoining the use by the defendants of script similar to that of the plaintiff. This injunction applies not only to the portable lamps but to the fluorescent fixtures as well. The Court apparently felt that the use of similar script by the defendants created a wider field for confusion and tainted the defendant's position with bad faith thereby justifying an injunction broader in scope.

The second *Sunbeam* case (*Sunbeam Furniture Corp.*) involved the same plaintiff as the earlier case. The defendant, however, was primarily a retailer engaged in selling household furniture, including electric lamps. All of the defendant's furniture and lamps bore in some manner the name "Sunbeam Furniture Corp." The lamps in addition, were referred to as "Sunbeam Lamps."

The District Court granted its injunction enjoining the defendant from any use of the name "Sunbeam." The

Court of Appeals reversed the District Court in part, limiting the injunction to the electric lamps. In pointing out its reason for refusing the injunction insofar as the name "Sunbeam Furniture Corp." is concerned, the Court of Appeals states at page 144, "As to this aspect of the case, the evidence reveals neither market competition nor confusion of source." The Court further relies upon the holding in the earlier *Sunbeam* case that the name "Sunbeam" is a weak mark, both because of its descriptive connotations and its frequent use by others, and therefore entitled to very narrow protection.

In relating the facts and the decision in the *Sunbeam* cases to the matter here concerned, the following comments are believed pertinent:

a. The "Sunbeam" trademark was a weak mark; our "Big Boy" trademark is a strong one. (See discussion in Par. VII beginning on page 14 of this brief.

b. In contrast to the *Sunbeam Lighting Co.* case, in which the defendant sold one principal type of its products exclusively to architects and engineers who were presumably skilled and enlightened buyers, here both parties seek to attract the same clientele, namely, the public at large.

c. We believe that the evidence in our case would show clearly that the relationship between barbecues for grilling hamburgers and the hamburgers themselves is closer in the public mind than is the relationship between home appliances (such as electric razors, mixers, and orange squeezers) and furniture (such as sofas and tables), or between home appliances and fluorescent lighting fixtures. It is at least as close as is the relationship between home appliances and portable and reading lamps, where protection was granted.

d. The decisions in both of the *Sunbeam* cases were made after the taking of testimony and after all of the facts were before the Court. It was then possible for the Court to state in the second case that no evidence of confusion had been shown. These cases, however, are not authority for the dismissal of a trademark infringement and unfair competition case on the basis of the pleadings alone.

## X.

**Where the Defendant Intends to Trade Upon the Trademark of the Plaintiff or Intends to Cause Confusion Among Purchasers, the Existence of the Intent Alone Raises a Presumption of Confusing Similarity and Is Itself Evidence of a Likelihood of Confusion.**

This proposition originated in *My-T-Fine Corporation v. Samuels*, 69 F. 2d 76 (2nd Cir. 1934), which involved an action for unfair competition brought by the manufacturer of a chocolate pudding against the defendant pudding manufacturer who had imitated the color and design of the plaintiff's packages. The Court found that the imitation by the defendant was done with the intention of trading on the plaintiff's good will; and in considering the question of confusion, the Court, speaking through Judge Learned Hand, at page 77 says:

"It would be impossible on this record to say that any one who meant to buy the plaintiff's pudding has hitherto been misled into taking the defendants' by a mistake in the appearance of the box. Indeed such evidence is usually hard to get even after a trial, and upon this motion the affidavits are too



hazy and unreliable, even if undisputed. The plaintiff has proved no more than that the boxes look a good deal alike, and that confusion may well arise; and were it not for the evidence of the defendants' intent to deceive and so to secure the plaintiff's customers, we should scarcely feel justified in interfering at this stage of the cause. We need not say whether that intent is always a necessary element in such causes of suit; probably it originally was in federal courts. *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 S. Ct. 396, 34 L. Ed. 997; *Elgin National Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 21 S. Ct. 270, 45 L. Ed. 365. But when it appears, we think that it has an important procedural result; a late comer who deliberately copies the dress of his competitors already in the field, must at least prove that his effort has been futile. *Prima facie* the court will treat his opinion so disclosed as expert and will not assume that it was erroneous. *Fairbank Co. v. R. W. Bell Mfg. Co.*, 77 F. 869, 877 (C. C. A. 2); *Capewell Horse Nail Co. v. Green*, 188 F. 20, 24 (C. C. A. 2); *Wolf Bros. & Co. v. Hamilton*, 165 F. 413, 416 (C. C. A. 8); *Thum Co. v. Dickinson*, 245 F. 609, 621, 622 (C. C. A. 6); *Wesson v. Galef* (D. C.), 286 F. 621, 626. He may indeed succeed in showing that it was; that, however bad his purpose, it will fail in execution; if he does, he will win. *Kann v. Diamond Steel Co.*, 89 F. 706, 713 (C. C. A. 8). But such an intent raises a presumption that customers will be deceived." (P. 77.)

This doctrine has subsequently been repeated in trademark cases, unfair competition cases and cases involving

both offenses. Sometimes it is expressed as a presumption, and sometimes the Court says merely that the intent supplies evidence of confusion.

#### TRADEMARK CASES.

*Time, Inc. v. Life Television Corp.*, 123 Fed. Supp. 470 (D. Minn. 1954);

*G. B. Kent & Sons v. P. Lorillard Co.*, 114 Fed. Supp. 621 (S. D. N. Y. 1953), aff'd on the op. of the Dist. Ct., 210 F. 2d 953 (2nd Cir. 1954).

#### UNFAIR COMPETITION CASES.

*Best & Co. v. Miller*, 167 F. 2d 374 (2nd Cir. 1948);

*E. Kahn's Sons Co. v. Columbus Packing Co.*, 82 F. 2d 897 (6th Cir. 1936);

*Progressive Welder Company v. Collom*, 125 Fed. Supp. 307 (D. Minn. 1954).

#### COMBINED CASE.

*G. H. Mumm Champagne v. Eastern Wine Corp.*, 142 F. 2d 499 (2nd Cir. 1944).

XI.

**Conclusion.**

The District Court in granting the defendants' Motion to Dismiss determined as a matter of law an issue which could only be decided as a question of fact after the taking of testimony. The relationship between the businesses of the plaintiff and the defendants is not such as to preclude a likelihood of confusion or confusion itself. By intentionally attempting to trade on the good will of the plaintiff, the defendants have raised a presumption that such efforts, unless restrained, will be successful. The plaintiff should, therefore, at least be granted the opportunity of proving that an injury has occurred.

Dated: August 12, 1955.

Respectfully submitted,

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## APPENDIX.

60 Stat. 437, 15 U. S. C. §1114 (1946):

*Remedies; infringements; innocent infringement by  
printers and publishers.*

(1) Any person who shall, in commerce, (a) use, without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of any registered mark in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to receive purchasers as to the source or origin of such goods or services; or (b) reproduce, counterfeit, copy, or colorably imitate any such mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in connection with the sale in commerce of such goods or services, shall be liable to a civil action by the registrant for any or all of the remedies hereinafter provided in this chapter, except that under subsection (b) of this section the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such mark is intended to be used to cause confusion or mistake or to deceive purchasers.

(2) Notwithstanding any other provision of this chapter, the remedies given to the owner of the right infringed shall be limited as follows: (a) Where an infringer is engaged solely in the business of printing the mark for others and establishes that he was an innocent infringer the owner of the right infringed shall be entitled as against such infringer only to an injunction against future

printing; (b) where the infringement complained of is contained in or is part of paid advertising matter in a newspaper, magazine, or other similar periodical the remedies of the owner of the right infringed as against the published\* or distributor of such newspaper, magazine, or other similar periodical shall be confined to an injunction against the presentation of such advertising matter in future issues of such newspapers, magazines, or other similar periodical: *Provided*, That these limitations shall apply only to innocent infringers; (c) injunction relief shall not be available to the owner of the right infringed in respect of an issue of a newspaper, magazine, or other similar periodical containing infringing matter when restraining the dissemination of such infringing matter in any particular issue of such periodical would delay the delivery of such issue after the regular time therefor, and such delay would be due to the method by which publication and distribution of such periodical is customarily conducted in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such infringing matter. July 5, 1946, c. 540, title VI, §32, 60 Stat. 437.

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\*So in original. Probably should read "publisher."



IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ROBERT C. WIAN ENTERPRISES, INC., a Corporation,

*Appellant,*

*vs.*

L. O. PERSINGER and MERLE PERSINGER, Individually and  
as Partners, doing business as BIG BOY MANUFACTUR-  
ING COMPANY,

*Appellees.*

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## APPELLEES' BRIEF.

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FILED

SEP 10 1955

PAUL P. O'BRIEN, CLERK



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No. 14723

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ROBERT C. WIAN ENTERPRISES, INC., a Corporation,

*Appellant,*

*vs.*

L. O. PERSINGER and MERLE PERSINGER, Individually and  
as Partners, doing business as BIG BOY MANUFACTUR-  
ING COMPANY,

*Appellees.*

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## APPELLEES' BRIEF.

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### I.

#### JURISDICTIONAL STATEMENT.

##### A. Jurisdiction of United States District Court.

###### 1. First and Second Causes of Action.

Section 1121, Title 15, United States Code confers original jurisdiction on the District Courts of the United States over all actions arising under the Lanham Act. The first and second causes of action of the amended complaint\* are brought under this act of Congress.

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\*The original complaint was amended to state Appellant's claims in separate counts. Since we are no longer concerned with the original complaint, the amended complaint will hereinafter be referred to as the complaint.

## 2. Third Cause of Action.

It is alleged in the complaint that the third cause of action relies for jurisdiction upon 28 United States Code, Section 1338, or upon the principle that this cause of action is related to a substantial claim under the trade-mark laws upon which the other causes of action are based. For reasons hereinafter stated, Appellees do not believe that the first two causes of action are substantial and that consequently the United States District Court did not have jurisdiction over the third cause of action.

Appellees are aware of the holding of the Ninth Circuit that Congress through the Lanham Act has opened the courts of the United States to suits for unfair trade practice. (See *Stauffer v. Exley* (9 Cir., 1950), 184 F. 2d 962, 967; *Pagliero v. Wallace China Co.* (9 Cir., 1952), 198 F. 2d 339; *Ross-Whitney Corp. v. Smith Kline & French Lab.* (9 Cir., 1953), 207 F. 2d 190.) However, since the decisions above cited other Circuits have arrived at the contrary conclusion, in well reasoned cases. (See *American Auto Ass'n v. Spiegel* (2 Cir., 1953), 205 F. 2d 771; *L'Aiglon Apparel v. Lana Lobell, Inc.* (3 Cir., 1954), 214 F. 2d 649.) We also note that one District Judge in this Circuit stated that were it not already the rule of the Ninth Circuit, he would agree with the decisions elsewhere to hold that unless such a cause of action is coupled with a substantial and related claim under the trade-mark laws of the United States, diversity is a necessary prerequisite to jurisdiction of the District Court. (See *Panaview Door and Window Co. v. Van Ness* (D. C., S. D., Cal., 1954), 124 Fed. Supp. 329.)

Since the rule of the Ninth Circuit is established as above set forth, we will not further discuss this jurisdic-



tional point, but we respectfully invite the Court's attention to the opinions of the other Circuits above cited and submit that there is no jurisdiction over the third cause of action unless there is a substantial and related claim under the trade-mark laws of the United States.

## **B. Jurisdiction of the United States Court of Appeals.**

If the United States District Court had jurisdiction in this action, the Court of Appeals has jurisdiction to review the final judgment of that court by authority of 28 United States Code, Section 1291, and 15 United States Code, Section 1121.

## **II.**

### **STATEMENT OF THE CASE.**

Appellant's statement of the case does not adequately mention various facts and matters disclosed by the complaint and the attached exhibits. Appellees therefore respectfully call the Court's attention to the following:

1. Appellant claims ownership of two registered trade-marks. The first mark was registered in 1952, and consists of a design of a fat boy and the word "Bob's." A copy of the certificate of registration attached to the complaint, marked Exhibit N, discloses that in a statement attached to said certificate, Appellant specifically disclaimed all of the wording shown on an accompanying drawing of the mark, except the word "Bob's," including the phrase "Home of the Big Boy (c) 1938." [R. 9, par. XIII; Ex. N.]

*Appellant did not allege in the complaint, nor does it claim in its opening brief, that Appellees have infringed the mark referred to in the preceding paragraph.*

2. In 1953, Appellant was issued a certificate of registration as a trade-mark of the words "Big Boy." In its statement attached to the certificate of registration, a copy of which is attached to the complaint, marked Exhibit O, Appellant said that "it has adopted and is using the trade-mark shown in the accompanying drawing for Hamburger Sandwiches." [R. 9, par. XIII; Ex. O.]

Appellant's registration of the words "Big Boy" as a trade-mark is limited to the words alone. There is no accompanying design. The words appear in block print or type of uniform thickness. [Ex. O.]

Although the complaint alleges that Appellant has registered two trade-marks with the United States Patent Office, the only trade-mark infringement alleged or claimed is based on Appellees' use of the mark "Big Boy."

3. Appellees' manufacturing business is named "Big Boy Manufacturing Company." They manufacture home barbecues, braziers and related accessories used in outdoor cooking. [R. 9.] They also sell other articles not related to cooking as appears from Exhibit R. The decal affixed to each barbecue or brazier which they manufacture and offer for sale states that the article to which it is attached is "Mfg. by Big Boy Mfg. Co., Burbank, Calif." Except for the words "Big Boy" this decal is not similar in design, kind of type or otherwise to Appellant's mark "Big Boy." [Ex. P.] Appellees' advertising booklet [Ex. Q] also states that their products advertised therein are "Manufactured by Big Boy Manufacturing Co." Appellees' business stationery has as part of its letterhead,

“Big Boy Manufacturing Co.” and on its left margin is set forth drawings of the various products which it manufactures. There are no food products set forth thereon. [Ex. R.]

4. Appellant owns and operates ten restaurants in Southern California in which it serves and sells a double-deck hamburger sandwich. [R. 4, par. V; R. 6, par. VII; R. 7, par. VIII.]

There is no averment in the complaint that Appellees' products compete with the hamburgers and other food products served in Appellant's restaurants or that they are sold to the same class of customers or in the same trade channels or that they are related products.

The questions involved in this appeal are:

(a) Did either the first or second cause of action state a claim upon which relief can be granted?

(b) If neither the first nor second cause of action states a claim upon which relief can be granted, did the District Court have jurisdiction to determine whether the third cause of action stated a claim upon which relief can be granted?

(c) If the District Court had jurisdiction over the third cause of action, did it state a claim upon which relief can be granted?

### III.

## SUMMARY OF ARGUMENT.

In a field of immense complexity and numerous close questions of law and fact, the case before the Court is one of fundamental simplicity. The embellishments of legal art are no more appropriate than embroidery on a coonskin cap. It has become almost axiomatic that the courts do not function in a vacuum and no observation is more appropriate in this case where common sense lights the decision of the District Court.

The complaint was prepared by able lawyers who declined an opportunity to amend [R. 38-39] because the entire factual situation was already most favorably and fully set forth. Nevertheless the complaint fails to allege the elements of trade-mark infringement under the Lanham Act. One required element is a "reproduction, counterfeit, copy or colorable imitation" of another's registered mark. (15 U. S. C., Sec. 1114(1).) But this does not appear in the complaint, either by way of fact, inference, or legal conclusion.

Another required element is that use of a reproduction, counterfeit, copy or colorable imitation of another's mark creates a "likelihood of confusion" on the part of purchasers of the source or origin of the goods or services. (15 U. S. C., Section 1114(1).) The first cause of action alleges that Appellees' use of the words "Big Boy" "necessarily tend to deceive and confuse" purchasers [R. 12, par. II] and this allegation is incorporated into the third cause of action. [R. 14, par. I.] But this is the only averment in the complaint which can be construed as an allegation of likelihood of confusion and it is a legal conclusion. The complaint does not set forth any facts to support it.

On the other hand, the complaint contains allegations of fact exemplified by exhibits which show that the above conclusion of "likelihood of confusion," if such it be, is not warranted and is unsupported by the facts. The result is an affirmative showing in the complaint that relief cannot be granted if credence is to be given to guiding decisions of this Circuit. See *Mershon Company v. Pachmayr* (9 Cir. 1955), 220 F. 2d 879, 883; *Sunbeam Furniture Corp v. Sunbeam Corp* (9 Cir. 1951), 191 F. 2d 141, 145; and *Sunbeam Lighting Co. v. Sunbeam Corporation* (9 Cir. 1950), 183 F. 2d 969. That there has been no infringement of Appellant's trade-marks appears from the exhibits which show no similarity of design, imitation or other likelihood of confusion of the source of obviously unrelated products. That is to say, there is nothing observable to the senses which would cause any reasonable person to confuse the marks of the respective parties.

All of the questions boil down to one: Has Appellant's use of the common words "Big Boy" in connection with a hamburger sandwich, which Appellant sells in its restaurants, acquired a secondary meaning broad enough to preclude its use by a manufacturer of outdoor home cooking equipment? Even if the words "Big Boy" have acquired a secondary meaning broad enough to include the entire restaurant business of Appellant and all services it may render in connection therewith, and licenses for use of such words in the sale of hamburger sandwiches by other restaurateurs, the gap between such meaning and the use of the same words by the manufacturers of outdoor home cooking equipment is such as to preclude conflict or likelihood of confusion in the public mind. However, if technical support for dismissal must be found for such an obvious conclusion, it may be found in the complaint.

No connection between the hamburger sold by Appellant, which we judge from Appellant's Opening Brief is regarded as the connecting link, and the outdoor cooking equipment manufactured by Appellees is alleged. It is not alleged, for instance, that Appellant's hamburgers are cooked upon equipment similar to that sold by Appellees nor that the equipment sold by Appellees is designed primarily, or at all, to cook hamburgers, least of all double-deck hamburgers similar to those sold by Appellant. It does not appear that the two products are sold at the same places customarily, or ever, or even in similar markets.

On the contrary, the products of Appellees are depicted on Exhibit R and some food products are shown upon Exhibit Q. Only one of the latter might be construed as a hamburger and then not a double-deck hamburger, and it might be any other form of meat on a bun. The Court well knows that outdoor cooking equipment such as depicted on Exhibit R is not especially designed for cooking hamburgers. Is a motor or a spit or a skewer so used? When the public thinks of outdoor cooking and barbecues, steaks, chops, spareribs, chickens and roasts come to mind.

Even if it be assumed, in the spirit of federal civil practice as it now exists, that allegations by conclusion that there is likelihood of confusion is sufficient, such allegations are completely canceled out by allegations of affirmative fact and exhibits which demonstrate the contrary. The motion to dismiss for failure to state a claim, in cases where the claim is asserted through allegations of fact, is designed to test the legal sufficiency of the facts stated. In this instance the trial court has found such facts to be legally insufficient to state a claim and Appellant has refused the Court's offer of an opportunity to amend.

IV.

ARGUMENT.

**A. A Trade-mark Such as "Big Boy" Made Up of Recognized Words in Common Use Is Narrowly Protected Under the Law of Trade-mark and Unfair Trade and Does Not Extend to Unrelated Products.**

In a recent Ninth Circuit case (1955) of trade-mark infringement and unfair trade practice involving the use of a white line upon a recoil pad affixed to a gun butt as a distinguishing mark of the maker, the principles applicable to the case at bar were clearly stated by the Court as follows:

"The words 'White Line' (as they are used, with the layer of white material constituting a white line around the pad) have no possible functional value and serve no purpose as descriptive of the article or its use. The symbol thus created acts as an arbitrary mark or sign of its owner's product in the same manner that the trade name or mark 'Sunbeam' serves its user, as particularly set out in our 'Sunbeam' cases, together with supporting authority. See *Sunbeam Lighting Co. v. Sunbeam Corp.*, 9 Cir., 1950, 183 F. 2d 969, certiorari denied 340 U. S. 920, 71 S. Ct. 357, 95 L. Ed. 665; *Sunbeam Furniture Corp. v. Sunbeam Corp.*, 9 Cir., 1951, 191 F. 2d 141. Therein we held that trade names made up of recognized words in use are protected narrowly. That is, the word 'Sunbeam' by trade-mark statute or by the laws of unfair trade, cannot be monopolized by anybody. If, however, as was the case in the Sunbeam cases, the trade word is not descriptive of the article in trade it will be protected in its application to the article or to the general nature of the article. The principle is applicable to the instant

case. A symbol, though comprised of common words, used upon a gun pad but which is not descriptive of a gun pad, may be protected as a statutory mark and as well as against the broader conception of unfair trade. The protection, however, would not go to the extent of preventing the use of the same symbol upon a product of an entirely different nature."

*Mershon Company v. Pachmayr* (9 Cir., 1955),  
220 F. 2d 879, 883.

In the first of the two *Sunbeam* cases (decided in 1950) to which the Court refers in the above quotation, a manufacturer of electrically operated household appliances sought to enjoin a manufacturer of fluorescent electrical fixtures from using the word "Sunbeam" in connection with its business. The plaintiff had registered the word as a trade-mark with the United States Patent Office.

The defendant had named its business "Sunbeam Manufacturing Company" and was using the words "Sunlite Master" as well as the words "Sunbeam Manufacturing Company, Los Angeles, California" on portable fluorescent lamps which it manufactured. The plaintiff used the word "Master" in connection with the word "Sunbeam" on its appliances. The trial court granted an injunction, but the United States Court of Appeals for the Ninth Circuit held that only where the relation between the products of the plaintiff and the products of the defendant was close was relief warranted. Defendant was enjoined from the use of the word "Master" or the words "Sunlite Master" in the sale of its lamps and also from the use of certain script print and the word "Sunbeam" on the ground that such script was similar to that used by the plaintiff and thereby likely to cause confusion. But the defendant's use of the word "Sunbeam" in its corporate name or in



the promotion or sale of those products which were not closely related to the products of the plaintiff was not enjoined.

In the second *Sunbeam* case referred to in the above quotation (decided in 1951), the same plaintiff sought an injunction against the use of the word "Sunbeam" by the Sunbeam Furniture Corp., which name was prominently displayed on its building, its furniture, price tags, shipping labels, invoices and stationery, as well as advertisements in furniture trade magazines. A small portion of its business was the sale of household electric lamps upon which appeared the words "Sunbeam Lamp."

The United States Court of Appeals for the Ninth Circuit held that the use of the word "Sunbeam" in connection with the sale of household lamps should be enjoined, but refused an injunction against defendant's use of the word "Sunbeam" in its corporate name and upon its other products because of the lack of close relationship between the products manufactured by the plaintiff and those manufactured by the defendant.

The following quotation is from the opinion of the first *Sunbeam* case (183 F. 2d at 972):

"The trial court's conclusion goes to the extent that, because the plaintiff has a registered and common-law trade-mark of the word Sunbeam and use thereof in relation to its actual produce and because of its extensive business, that word is plaintiff's sole property in commerce in the whole broad electrical field. This conclusion extends the restriction on the use of a non-fanciful word far beyond any instance that we are aware of. We are unwilling to affirm the holding that the possibility or the actual proof of an occasional instance of a person's surmise that defendants' print of 'Made by Sunbeam Electrical

Appliance Co., Los Angeles, California' or similar wording in a catalog or on an electrical fluorescent fixture suggests plaintiff as the manufacturer, and is enough to support the injunction. The law goes to no such extreme.

"There is no evidence that either party to the action is in competition in the market. The evidence is conclusively the other way. It is unreasonable to say that a person shopping for a shaver, an egg beater, or a mixer, which is a matter of common shopping in variety and hardware stores, would have occasion to even think of an electric fluorescent light fixture which, as the evidence shows, is ordinarily selected by an architect and installed by an engineer. And no purchaser or selector or installer of the light fixture would have a kitchen labor-saving gadget in mind or if he had, that it would affect his act. If plaintiff's goods are so good that the mere mention of their trade-name or mark would be sufficient for a reasonable person to select an article bearing it, no matter how unrelated plaintiff's goods are to the article, then, as it seems to us, plaintiff must suffer the price of virtue. If, in course of our free enterprise, someone would market an unworthy article outside plaintiff's field bearing the name Sunbeam it must be borne as not an unlikely circumstance following plaintiff's selection of a non-fanciful word popular with commercial concerns."

And in the same opinion, at page 973:

"Realizing the continuously expanding use of electrically operated conveniences in the progress of the civilized world, it seems quite unreasonable to hold that the plaintiff company with its well-earned reputation for quality in its line should have the legally enforceable monopoly to this superlative term through-

out the whole electrical world. It stretches to the very top of the unreasonable to say that the word 'Sunbeam' applied to a household utility machine operated by electricity should be adjudged to bring a stop to its long continued use in the firm name of a successful business enterprise whose business is the manufacture and sale of fixtures for the production of fluorescent light, a light which more closely resembles the light of a sunbeam than any other light yet discovered."

In the second *Sunbeam* case, this Court said (191 F. 2d at 145):

" . . . A common word like 'Sunbeam' cannot be completely removed from the public domain. . . ."

Appellant's trade-mark of the words "Big Boy" is a use or application of non-fanciful words of ordinary meaning to its own product, to wit, a double-deck hamburger, and also, to give the complaint its broadest interpretation, to the restaurant business of Appellant and its licensees. Again to give the complaint its broadest interpretation, the words "Big Boy" as used by Appellant have acquired a secondary meaning so that they call to the public's mind the Appellant's hamburger, its restaurant business and the restaurant business of its licensees. Its claim is almost a paraphrase of the claim in the *Sunbeam* case stated in the beginning sentence in the foregoing quotation—except that Appellant's claim is broader even than the claim made in the *Sunbeam* case in that Appellant not only claims the use of the words "Big Boy" in the whole broad restaurant field, but in addition thereto in the field of the manufacture of outdoor home cooking equipment of all types. In the light of the foregoing

quotations from the decisions of this Court, how can the claim of the Appellant be actionable?

The words are non-fanciful. Their use may be protected only insofar as they have acquired a secondary meaning through use in connection with a specific product or business.

Appellant in its opening brief has leaped to the conclusion that the words "Big Boy" are "a strong mark," a classic example of which is "Kodak," rather than a weak mark, and with this step once taken, has sought to apply the law of cases wherein fanciful names have been granted broad protection. It is earnestly and respectfully submitted that the application of such terms of legal convenience (the equivalent, in effect, of legal shorthand) leads to inaccurate analysis and that the fundamental principles of the law of trade-mark and unfair trade practice have been expressed in ordinary language by this Court in the above-cited cases where it clearly appears that non-fanciful words are only protected in the restricted field of their acquired secondary meaning.

While it is clear from the *Sunbeam* cases and others that actual competition is not an essential element to protection against unfair trade practice or trade-mark violation, its absence diminishes the likelihood of confusion in the mind of the prospective purchaser. Where the goods of one party are not closely related in character, in their place of sale or in their method of marketing, there is little or no likelihood of confusion of source of the product. When, in addition, the source of the product is clearly indicated by Appellees where the words "Big Boy" are used by them, a complaint which alleges no closer relationship is not legally sufficient to warrant relief and should be dismissed. As the complaint discloses, in adver-

tising and promoting their products and on the labels affixed thereto, Appellees have indicated that such products are "Mfg. by Big Boy Mfg. Co., Burbank, Calif." [R. 9 and 10; and Ex. P.] This is a sufficient and complete disclosure of the source or origin thereof (*S. C. Johnson & Son v. Johnson* (2 Cir., 1940, 1949), 116 F. 2d 427, 175 F. 2d 176, Cert. den. 338 U. S. 860, 94 L. Ed. 527, 70 S. Ct. 103).

In ruling upon Appellees' motion to dismiss in this case the trial judge said [R. 38-39]:

"The Court: I do not think the relationship is close enough. Consequently, I will grant the motion to dismiss, with leave to file an amended complaint showing that there is a closer relationship. But I do not think that you have established your right in the food industry, in the restaurant business, so that you can carry over that right into a manufacturing business."

**B. Protection of Common Non-fanciful Words Fancifully Applied as a Trade-Mark Will Not Be Extended Beyond the Secondary Meaning Which They Acquire.**

Point VII of the opening brief discusses "strong" and "weak" trade-marks and concludes that "Big Boy" is a strong mark. That this is not helpful terminology has already been pointed out and Appellees believe that its use has brought Appellant to a mistaken conclusion.

Appellant relies chiefly upon the case of *Stork Restaurant v. Sahati* (9 Cir., 1948), 166 F. 2d 348. It is certainly true that the words "Stork Club" are fancifully applied and are not descriptive of a night club or restaurant for all of the reasons mentioned by the Court. It is also one of the most famous night clubs in the world. It

is probably safe to say that most adults know of the existence of the Stork Club.

Use of the name "Stork Club" by a "small bar, tavern and cocktail lounge" in San Francisco was enjoined. But the Court did not reach this conclusion by determining that "Stork Club" was a strong mark. It pointed out that fanciful non-descriptive names warranted greater protection than descriptive words but under the title "Confusion of Source" at page 356 of the opinion, the Court prefaced its remarks by saying:

"We reach now what is perhaps the controlling principle in the instant case."

The first and most obvious fact and most distinguishing characteristic between the *Stork* case and the case at bar is that in the former the litigants were in the same business.

Would it not be reasonable to suppose that a successful night club from New York might also open a night club or restaurant in the City of San Francisco which enjoys a worldwide reputation for the high quality of its restaurants and which city in its cosmopolitan nature more resembles New York City than any other city on the Pacific Coast? Restaurant chains are not new. The likelihood of confusion of source is, therefore, quite apparent in the *Stork* case for reasons which do not appear in the case at bar.

The name "Big Boy" is to some extent descriptive and, therefore, its use elsewhere is more to be expected. Appellant chose the name with this fact before it. It is much less fanciful than "Stork Club". Even so, Appellant would likely deserve protection against its use by another restaurant, but the words are most certainly not in the same class with "Kodak" and "Nujol."

To put the matter in the words of Mr. Justice Minton, whose viewpoint coincides with the opinions in the *Sunbeam* cases and who was United States Circuit Judge at the time of writing the opinion from which we quote:

“Unless ‘Sunkist’ covers everything edible under the sun, we cannot believe that anyone whose I.Q. is high enough to be regarded by the law would ever be confused or would be likely to be confused in the purchase of a loaf of bread branded as ‘Sunkist’ because someone else sold fruits and vegetables under that name. The purchaser is buying bread, not a name. If the plaintiffs sold bread under the name ‘Sunkist,’ that would present a different question; but the plaintiffs do not, and there is no finding that the plaintiffs ever applied the word ‘Sunkist’ to bakery products.

“The unconscionable efforts of the plaintiffs to monopolize the food market by the monopoly of the word ‘Sunkist’ on all manner of goods sold in the usual food stores should not be sanctioned by the courts. The trade-marks should be confined substantially to the articles for which they were authorized, otherwise, why limit the marks at all? Before a trade-mark can be granted under the applicable Lanham Act, the application therefor must name the products to which it is to apply. 15 U. S. C. A., Section 1051. We are unable to see how one seeking to purchase bread could be likely to be confused as to the source of origin of the bread, although sold under a trade-mark valid for fruits and vegetables. Certainly this must be true where bread has never been sold by the owner of said trade-mark, valid as to fruits and vegetables.”

*California Fruit Growers Exch. v. Sunkist Baking Co.* (7 Cir., 1947), 166 F. 2d 971, 973.

It is worth noting that in both the *California Fruit Growers* case and in the *Sunbeam* cases the respective courts refused to permit a monopoly of name even in the same industry. Appellant asks for even more.

The trial court did not base its judgment upon the idea that relief cannot legally be granted because one party is in the restaurant business and the other is in the manufacturing business. It based its judgment upon the fact that the two businesses and respective products were unrelated so that no confusion of source was likely. The differences in the two businesses was only one element.

The cases cited at page 18 of the opening brief are all cases where there was a close relationship shown between the activities of the opposing parties even though such activities were in somewhat different fields. We do not beg the question or seek to hide behind the skirt of technical terms or distinction. It is the position of Appellees that there is no likelihood of confusion shown by the complaint, which since opportunity to amend was declined presumably states all that can be said in support of the claim.

The facts that one party is in the restaurant business and that the other manufactures products of iron and steel, that they are not competitive, that their products are not sold in the same market, are elements affirmatively opposed to likelihood of confusion and appearing from the complaint.

Appellant's attempt to distinguish the *Sunbeam* cases at Point IX, pages 19-22 of the opening brief is a weak struggle. As pointed out elsewhere in this brief the terms "strong" and "weak" marks do not lead to reasoning on principle. Appellant thinks that the marketing



factor of the *Sunbeam* cases is a distinguishing point, but the contrary is true. Appellant's sales are confined to the restaurant business as appears from the complaint. There is no averment that barbecue or cooking equipment is sold in the same market. So what is the fact in this case and where is the distinction? The likelihood of confusion by the relationship between outdoor cooking equipment and double-deck hamburgers sold by Appellant is a matter we leave to the Court. Finally they argue that the *Sunbeam* cases are not authority because they were not decided on motion. This is no distinction of guiding principles.

**C. Upon a Motion to Dismiss, Whether the Complaint States a Claim for Relief Is a Question of Law.**

In Appellant's summary of argument and in Point VI of its opening brief it is contended that the question of likelihood of confusion is a question of fact which cannot be determined upon a motion to dismiss. This overlooks Appellant's Point V that upon such a motion the properly pleaded allegations of the complaint must be treated as true. This fact cuts both ways. It precludes a challenge of the facts properly pleaded but it also tests the legal sufficiency of the complaint as it stands without benefit of any further, additional or different proof of fact.

It is immaterial, therefore, what Appellant might be prepared to prove in relation to any fact alleged in the pleadings. There are no issues of fact, and no room for proof. It is the equivalent of a motion for non-suit. All of the Plaintiff's facts are before the Court. There is no denial and consequently no issue of fact. The question is: Are these facts sufficient to warrant relief?

The complaint contains but one allegation which might be construed as an allegation of likelihood of confusion, to wit: That Appellees' use of the words "Big Boy"

" . . . are deliberately calculated and intended to deceive and confuse, and necessarily tend to deceive and confuse, the purchasing public . . ."  
[R. 12.]

These are actually averments of intentional use and actual confusion rather than the likelihood of confusion. If treated as indirect allegations of likelihood of confusion, these averments are at best conclusions. Opposed thereto are the allegations of actual fact and the true picture painted by the exhibits which show conclusively the unrelated nature of the two businesses.

Appellant declined an opportunity to amend to show a closer relationship or any further fact to show likelihood of confusion. Nothing more could be said. So as the complaint stands it is both insufficient to show likelihood of confusion and affirmatively shows such lack of relationship between the two businesses as to compel the trial court to hold the complaint insufficient on both grounds. Allegations of fact control over conclusions drawn contrary thereto.

Use of a registered mark is not sufficient to constitute infringement in the absence of likelihood of confusion.

*Radio Corp. of America v. R. C. A. Rubber Co.*  
(D. C., N. D., Ohio E. D., 1953), 114 Fed.  
Supp. 162;

4 Callmann, *Competition and Trade-Marks* (2d Ed.), Sec. 84, p. 1626.

An examination of Appellant's citations under Point VI of the opening brief explains Appellant's misconception of this point. The case of *John Walker & Sons v. Tampa Cigar Co.* (5 Cir., 1952), 197 F. 2d 72, is one where the contention was made that as a matter of law there could be no likelihood of confusion since the products were non-competitive. The Court held that a close enough relationship to cause confusion may exist between two businesses even though they are not competitive. But when the complaint shows both that the goods are not competitive and that there is no close relationship between the two businesses, the Court may certainly conclude that there is no likelihood of confusion and dismiss the complaint.

See the case of *Christianson v. West Pub. Co.* (9 Cir., 1945), 149 F. 2d 202, 203:

“ . . . There is ample authority for holding that when the copyrighted word and the alleged infringement are both before the court, capable of examination and comparison, non-infringement can be determined on a motion to dismiss.”

At page 13 of the opening brief appellant cites three other cases as occasions when it had been held that likelihood of confusion is one of the facts to be decided on the merits. In each case the reason for the ruling is easily understood and none of them hold that the issue may not be decided upon a motion to dismiss.

In *Pure Foods v. Minute Maid Corp.* (5 Cir., 1954), 214 F. 2d 792, there was a close relationship between the parties because both were in the frozen food business out of which the dispute between them arose. Moreover, the case went to trial and the Court simply held that on the trial the question of likelihood of confusion

was an issue of fact. In *Q-Tips v. Johnson & Johnson* (3 Cir., 1953), 206 F. 2d 144, both parties manufactured and sold products which were substantially identical. Both were in the same business. The original issue arose on a motion for summary judgment after the issues had been framed by denials. The case was later tried and likelihood of confusion was treated as an issue of fact. The appellate decision cited by Appellant does not mention the point for which its decision was cited. In *Chappell v. Golkman* (5 Cir., 1950), 185 F. 2d 215, the issues had been framed and the motion was treated as one for summary judgment.

Pertinent to the fact that both parties to this action must confine themselves to the facts alleged in the complaint, Appellees respectfully invite the Court's attention to what might be misleading on page 17 of the opening brief. The quotation marks appearing on this page enclose pure argumentative and imaginative fancy and are not to be taken as a quotation of a fact admitted on this appeal or otherwise.

**D. No Evidence of Likelihood of Confusion Arises From a Showing of Intent to Deceive Purchasers Unless There Is Competition or a Close Relationship Between the Products Involved and the Question of Likelihood of Confusion Is Doubtful.**

Point X of Appellant's Opening Brief at page 22 is devoted to the idea that the allegation of intent which appears in the record at page 12, Paragraph II, is sufficient to raise a presumption that there is a likelihood of confusion of the products of the parties. We do not so view the law.

In each of the cases cited by Appellant, including the case of *My-T-Fine Corporation v. Samuels* (2 Cir., 1934),

69 F. 2d 76, there was a close relationship or direct competition between the businesses. Except for the fact of an established intent, there was doubt as to whether there was likelihood of confusion, the question of intent tipping the scales sufficiently to warrant relief.

Appellees believe that the use of the term “presumption” is inaccurate. However, in any case, it is a matter which may be either rebutted or overcome by other elements in the case since it is immaterial except in cases of actual competition or close business relationship.

In one of the cases cited by Appellant, where existence of intent was relied upon to furnish evidence of likelihood of confusion, the Court recognized that where there was little likelihood of confusion, intent was immaterial.

“Cases will arise, of course, where the facts so clearly establish that no confusion will result that the intent of the defendant becomes immaterial.”

*Time, Inc. v. Life Television Corp.* (D. C. D. Minn., 1954), 123 Fed. Supp. 470 at 475.

**E. Appellant's Argument Is Predicated Upon the Assumption That Certain Facts Were Well Pleaded, and Hence Admitted, When in Fact They Were Not Pleaded at All.**

At page 9 of the opening brief, Appellant has asserted that the complaint alleges reproduction by Appellees of the registered mark of Appellant with references to paragraphs XIV-XXI at page 14 of the record. We respectfully submit that this is not the case. The only reference to paragraphs XIV-XXI on page 14 of the record is in paragraph I of the third cause of action wherein paragraphs so numbered are incorporated. Apparently the paragraphs of the complaint referred to appear at pages 9-11 of the record.

Paragraph XV [R. 9] alleges that Appellees affix a decal to their products [Ex. P]. As Judge Garrecht said in *Christianson v. West Pub. Co.* (9 Cir., 1945), 149 F. 2d 202, 203:

“ . . . when the copyrighted word and the alleged infringement are both before the court, capable of examination and comparison, non-infringement can be determined on a motion to dismiss.”

We respectfully represent to the Court that an examination of the decal of Appellees and comparison with the trade-mark of Appellant will more clearly demonstrate to the Court that there has been no reproduction of the registered mark of the Appellant than any words which we could put in this brief.

Paragraph XVI [R. 10] refers to an advertising booklet unidentified by the complaint, but without any allegation that the booklet reproduces the trade-mark of Appellant. Paragraph XVII [R. 10] refers to Exhibit Q, which is the photostat of the back cover of one of Appellees' advertising booklets. Further reference is made to Exhibits C, F, G, I and J. It is not alleged that there is any reproduction of the mark of Appellant and a comparison of the exhibits referred to will demonstrate that there has been no reproduction. The same can be said of Paragraph XVIII [R. 10] which refers to Exhibit R, a copy of the letterhead of Appellees.

The remaining paragraphs do not refer to any other items upon which a reproduction of the registered mark of Appellant could appear, nor is it otherwise alleged any place in the complaint that there was any reproduction of

the trade-mark. Appellees respectfully submit to the Court that since there was no reproduction of the mark there could be no use thereof in interstate commerce and that the elements of trade-mark infringement required for a statement of a substantial claim under the trade-mark laws of the United States in the first and second causes of action of the complaint are lacking for these reasons as well as the others specified in this brief and that the third cause of action falls for want of jurisdiction since there is no substantial or related claim under the trade-mark laws of the United States.

### Conclusion.

One may well speculate upon the purpose or at least the result of Appellant's action if successful. It would have a ready-made market for manufactured items which are entirely foreign to its present business and could capture with the blessing and protection of the Court the trade built up at the expense of Appellees.

Respectfully submitted,

ALBERT LEE STEPHENS, JR.,

*Attorney for Appellees.*





No. 14723  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

ROBERT C. WIAN ENTERPRISES, INC., a Corporation,  
*Appellant,*  
*vs.*

L. O. PERSINGER and MERLE PERSINGER, Individually and  
as Partners, Doing Business as Big Boy Manufacturing  
Company,  
*Appellees.*

---

**APPELLANT'S REPLY BRIEF.**

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---

**APPELLANT'S REPLY BRIEF.**

---

**ARGUMENT.**

I.

In Entering the Order of Dismissal, the Court Below  
Either Ignored Altogether or Resolved Summarily  
and Prematurely Factual Issues That Could Prop-  
erly Be Determined Only From the Evidence at a  
Trial.

**A. The Basis of Decision as Announced by the Trial Judge.**

The defendants (the Appellees will be hereinafter re-  
ferred to as "the defendants") assert at page 18 of their  
brief that "The trial court did not base its judgment upon  
the idea that relief can not legally be granted because  
one party is in the restaurant business and the other

is in the manufacturing business.” As we read the record, that is exactly the basis upon which the Court did rest its decision. At the hearing below, we were from the outset confronted by Judge Westover with the concept that since we were in the restaurant business and the defendants were in the manufacturing business, we could not show a case for relief, as the following quotations from the transcript will show:

“The Court: So now the only issue in this case is the relation of the restaurant business to the manufacturing business, and that is all.” [Tr. Rec. p. 34.]

\* \* \* \* \*

“The Court: That is right. But you have a manufacturing business here; you are not selling food.” [Tr. Rec. p. 35.]

\* \* \* \* \*

“The Court: If the defendants here were attempting to establish a restaurant, I would go along with you, but they are not.” [Tr. Rec. p. 37.]

\* \* \* \* \*

“The Court: I do not think the relationship is close enough. Consequently I will grant the motion to dismiss, with leave to file an amended complaint if you so desire, and if you can file an amended complaint showing that there is a closer relationship. But I do not think that you have established your right in the food industry, in the restaurant business, so that you can carry over that right into a manufacturing business.” [Tr. Rec. pp. 38-39.]

No amendment of our complaint could overcome the fact that we *are* in the restaurant business and the defendants are manufacturers. However, we believe that



this is not the true test of whether or not we are entitled to relief.

“ . . . the basic test of trade-mark infringement is whether the goods of the alleged infringer would be supposed by the kind of people who purchased them to emanate from the same source as the goods of the complainant.” (*Dwinell-Wright Co. v. National Fruit Product Co.*, 140 F. 2d 618, 622 (1st Cir. 1944).)

This same principle has been well stated by Judge Yankwich in an opinion that, on appeal, was adopted as the expression of this Court:

“Consequently, the courts, in both trademark and unfair competition cases, have held that where the dominant portion of a trademark, tradename or business has become identified in the mind of the public with the first user, he will be protected in the use of the name, even against a new-comer having the same surname.” (*Brooks Bros. v. Brooks Clothing of California*, 60 F. Supp. 442, 450 (S. D. Cal. 1945), aff'd 158 F. 2d 798 (9th Cir. 1947).)

#### **B. The Basis of Decision as Visualized by the Defendants.**

The brief of the defendants implicitly recognizes that the above quoted statements properly set forth the controlling principle, and they seek to justify the decision below by asserting that it was based “ . . . upon the fact that the two businesses and respective products were unrelated so that no confusion of source was likely. The differences in the two businesses was only one element.” (Appellee Br. p. 18.) But this is a question of fact that must be determined from the evidence at a trial, as we pointed out in our opening brief, beginning at page 12. We again invite the attention of the Court to the case of *John Walker*

*& Sons v. Tampa Cigar Co.*, 197 F. 2d 72 (5th Cir. 1952) as a perfect example of the error that results from seeking to decide a matter of this type without a trial. The defendants say that our citing of the *Johnnie Walker* case stemmed from our misconception, because in our case “. . . the complaint shows both that the goods are not competitive and that there is no close relationship between the two businesses, and the Court may certainly conclude that there is no likelihood of confusion and dismiss the complaint.” (Appellee Br. p. 21.) But this is exactly what the judge in the *Johnnie Walker* case was reversed for doing! In sending the case back for trial, the opinion of the Court of Appeals stated:

“Certain it is this suit for trademark infringement may not be dismissed on motion where there is presented a factual issue as to whether defendant’s use of the name Johnnie Walker is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods.” (P. 74.)

In assuming that our business is so remote from that of the defendant that no confusion is likely, the defendants beg the very question that will be a principal issue of fact at the trial of this case. How can it be said, as a matter of law, that a restaurant operation featuring a “Big Boy” hamburger is fatally remote in its relationship with the outdoor barbecues and related accessories that are commonly used in the home production of the same menu item? Is it true, as the defendants contend, that as a matter of law the relationship in this case is more remote than is that of whiskey compared with cigars (*John Walker & Sons v. Tampa Cigar Co.*, 197 F. 2d 72 (5th Cir. 1952)? If the defendants are correct here, do they not have trouble with the thirteen cases cited at pages 16 and 17 of our opening brief? And what becomes of the

defendants' position when they consider *Churchill Downs Distilling Co. v. Churchill Downs*, 90 S. W. 2d 1041 (Ct. of App. Ky., 1936) (race track corporation protected against infringement by whiskey bottler); or *Duro Pump & Mfg. Co. v. California Cedar Products Co.*, 11 F. 2d 205 (App. D. C. 1926) (pneumatic pumps v. wallboard); or *Radio Corporation of America v. Rayon Corporation of America*, 139 F. 2d 833 (C. C. P. A. 1943) radios, etc. v. knitted rayon materials); or *Safeway Stores, Inc. v. Safeway Const. Co., Inc.*, 74 F. Supp. 455 (S. D. Cal. 1947) (grocery business v. building contractor)? In all of the cases mentioned or cited in this paragraph, the adjudicated right to protection was supported by a finding from the factual evidence that the relationship between the businesses or articles concerned was sufficient to warrant that result. In some of those cases, the tribunal below was reversed for having initially dismissed the complaint or for having otherwise ruled to the contrary.

See:

*John Walker & Sons v. Tampa Cigar Co.*, 197 F. 2d 72 (5th Cir. 1952);

*Churchill Downs Distilling Co. v. Churchill Downs*, 90 S. W. 2d 1041 (Ct. of App. Ky. 1936);

*Duro Pump & Mfg. Co. v. California Cedar Products Co.*, 11 F. 2d 205 (App. D. C. 1926);

*Radio Corporation of America v. Rayon Corporation of America*, 139 F. 2d 833 (C. C. P. A. 1943).

From all of the foregoing, it is apparent that the matter of whether or not our business is entitled to protection against infringement at the hands of the defendants, is a question of fact to be determined from the evidence.

In saying now simply that the relationship is not sufficient to warrant such protection, the defendants are only expressing their conclusion as to what the evidence in this case will show. Just as occurred in the *Johnnie Walker* case, when it went back for trial, we believe that the evidence we are prepared to present will establish that the defendants were wrong in their conclusion. We ask here only that we be allowed to try the case.

“While generalizations are, at times, helpful in giving us a thread or a criterion of similarity or dissimilarity, ultimately, the determination of a case involving trademark infringement or unfair competition, calls for pragmatic action. Each case must be determined in the light of its particular facts.” (*Palmer v. Gulf Pub. Co.*, 79 F. Supp. 731, 737 (S. D. Cal. 1948).)

In determining the ultimate issue of whether or not a plaintiff is entitled to trademark protection in a particular case, there are a number of factual questions that are entitled to consideration. This is well illustrated in the case of *Chappell v. Goltsman*, 186 F. 2d 215 (5th Cir. 1950). The plaintiff, who produced and sold blackberry preserves under the trademark “Bama”, sought to enjoin use of that name by the defendant in the sale of blackberry wine. As was done here, the trial judge dismissed the complaint upon the ground of failure to state a claim upon which relief could be granted. In reversing and remanding for trial, the Court of Appeals said:

“It is apparent that the court . . . completely disregarded as unimportant the averments of the complaint in respect to the long continued use of the trade-mark; the fact alleged that plaintiffs’ trade-mark has become identified with plaintiffs’ products

and business to the exclusion of all others and has thus acquired a secondary meaning; the averment that the similarity of defendants' trade-mark to the trade-name The Bama Company will and does embarrass and obstruct the business of plaintiffs, cause confusion and mistake, and deceives the public, and that the adoption by the defendants of a trade-mark so similar to plaintiffs' trade-name and trade-mark is injurious to the reputation, credit, and good standing of the plaintiffs; and last but by no means least, the averments which charge preconceived intention to injure plaintiffs, fraud and bad faith." (186 F. 2d 215, 217-218.)

The complaint in this case raises similar factual issues that are pertinent in determining our right to recover. To them we now turn once again in light of the defendants' brief.

### **C. The Factual Issues Actually Presented by the Complaint.**

1. *The Likelihood of Confusion.* The whole position of the defendants on this point is summed up in the following statement from their brief:

"The facts that one party is in the restaurant business and that the other manufactures products of iron and steel, that they are not competitive, that their products are not sold in the same market, are elements affirmatively opposed to likelihood of confusion and appearing from the complaint." (Appellee Br. p. 18.)

We respond with the following:

(a) With slight paraphrasing, the defendants could just as well apply the above statement to almost all of the above-mentioned cases in which a contrary conclusion was drawn and in which protection was

granted or the matter was sent back for trial on the facts.

(b) We do not contend that a person that buys one of the defendants' barbecues made of steel thinks that he is getting a hamburger. But is it not a question of fact whether such a person might conclude that the plaintiff is extending its participation in the "hamburger field" by offering to the public the equipment upon which they can produce their own hamburgers at home?

(c) "Even if the goods be not in competition, the law protects a merchant in his interest 'in other goods, services or businesses which, in view of the designation used by the actor, are likely to be regarded by prospective purchasers as associated with the source identified by the trademark or tradename.'" (*Brooks Bros. v. Brooks Clothing of California*, 60 F. Supp. 442, 453 (S. D. Cal. 1945)). Is it not a question of fact whether or not this is the situation here, as suggested above? Furthermore, the matter of whether in actuality the defendants are in competition with us, in itself presents a real issue that should be litigated. (See par. C, 4, *infra*.)

(d) It is well established that proof of actual confusion or deception as to source is not necessary in order to entitle the plaintiff to relief.

*Pastificio Spiga Societa Per Azioni v. De Martini Macaroni*, 200 F. 2d 325 (2nd Cir. 1952);

*Sun-Maid Raisin Growers v. Mosesian*, 84 Cal. App. 485 (1st Dist. 1927).

Nonetheless, proof that such confusion had actually occurred is a strong factor in justifying the grant-

ing of relief. The opinion in the *Churchill Downs* case clearly shows that the Court was considerably influenced in its decision by the fact that . . . “The evidence plenteously establishes that its [the defendant’s] use of this name actually had an effect on the public to the prejudice of the reputation of Churchill Downs.” (*Churchill Downs Distilling Co. v. Churchill Downs*, 90 S. W. 2d 1041, 1044 (Ct. of App. Ky. 1936).)

See also, *Del Monte Special Food Co. v. California Packing Corporation*, 34 F. 2d 774 (9th Cir. 1929). We are prepared to offer similar proof on this important factual issue.

2. *The Strength of the Plaintiff’s Trade Mark.* We agree that a strong trade mark is entitled to broader protection than is a weak one, and we readily acknowledge that our “Big Boy” is not in a class with “Kodak”, or “Nujol”. However, we reject the defendants’ expert analysis that “It is much less fanciful than ‘Stork Club’” (Appellee Br. p. 16), and thus cannot be protected outside the restaurant field. The words of our trade mark constitute a commonly used expression, it is true; but they do not constitute an expression commonly used in referring to a hamburger; and it is in this context that they are fanciful. At least one of the two words “Stork Club” is descriptive, as is shown by the defendants’ use of it in identifying the very thing that they assert it does not describe. (See Appellee Br. p. 15.)

Our mark is just as fanciful as is “Minute Maid” (*Pure Foods v. Minute Maid Corp.*, 214 F. 2d 792 (5th Cir. 1954)); or “White House” (*Dwinell-Wright Co. v. National Fruit Product Co.*, 140 F. 2d 618 (1st Cir.

1944)); or "Bama" in Alabama (*Chappell v. Goltsman*, 186 F. 2d 215 (5th Cir. 1950)); and it is far less descriptive than the "Tips" that was involved in "Q-Tips" opposing "Johnson's Cotton Tips" (*Q-Tips, Inc. v. Johnson & Johnson*, 206 F. 2d 144 (3rd Cir. 1953)). As in all of the above cited cases, our right to protection depends upon the extent to which we have built up a secondary meaning for our "Big Boy". We do not claim an exclusive appropriation, but we think that our secondary meaning is broad enough to cover the present infringement by the defendants. Here again is a question for factual proof.

"In cases such as this then, both the similarities of the goods and of the marks used upon them must be considered together in order to arrive at an answer to the ultimate question of the likelihood of consumer confusion as to source. And to answer this question it is apparent that testimony may cover a wide range and that a great many factors must be considered, evaluated and related to one another. Thus the ultimate question of infringement is one of the type ordinarily classified as one of fact . . . [citing cases], and as such it is one primarily for the fact-finding tribunal—in this case the district court— . . . ." (*Dwinell-Wright Co. v. National Fruit Product Co.*, 140 F. 2d 618, 623 (1st Cir. 1944)).

3. *The Extent to Which "Barbecue" Connotes "Hamburger"*. At page 8 of their brief, the defendants offer the expert opinion that "When the public thinks of outdoor cooking and barbecues, steaks, chops, spareribs, chickens and roasts come to mind." We are somewhat surprised that the lowly hamburger is omitted from this list. Perhaps it is due to the difference in standard of living that our testimony would have included, and even



emphasized, that item. But, here again, it would seem to us that this is a matter for the trier of fact to determine.

4. *The Issue of Competition.* The defendants somehow read into the complaint an acknowledgment that the defendants are not in competition with the plaintiff and that their products are not sold in the same market. (Appellee Br. p. 18.) On the contrary, here we have another issue of fact. It is true that one does not buy our products and those of the defendants in the same places. However, the people who comprise the market for each are the people who like hamburgers, and both parties are competing for their trade.

5. *The Extent to Which the Addition of the Name of the Defendant Company to Their "Big Boy" Labels Alays or Aggravates Confusion.* The defendants call attention to the fact that their "Big Boy" decals that are affixed to some of their articles disclose "Mfg. by Big Boy Mfg. Co., Burbank, Calif." (Appellee Br. p. 15.) They thereafter argue that confusion of source is completely negated. The same contention was unsuccessfully raised in the case of *Del Monte Special Food Co. v. California Packing Corporation*, 34 F. 2d 774 (9th Cir. 1929), as is shown from the following discussion in the opinion:

"It is manifest from the consideration of the facts that the conduct of the appellant [the defendant] in labeling its oleomargarine 'Del Monte Brand' is equivalent to marking it 'made by the California Packing Corporation' [the plaintiff]. Indeed, from the evidence, it would appear much less objectionable to make this direct statement than to label its goods 'Del Monte Brand' coupled with the name of the

‘Del Monte Special Food Company’ as the producer, for the reason that the public knows of the goods of the appellee by the brand rather than by its name.” (34 F. 2d 774, 775.)

The converse argument was made, with equal lack of success, in *Standard Oil Co. v. California Peach & Fig Growers, Inc.*, 28 F. 2d 283 (D. Del. 1928), in which the opinion stated, at page 286:

“The defendant seeks to prevent a finding of confusion upon the further ground that many advertisements of ‘Nujol’ do not contain the name or other indication of the identity of its manufacturer or producer. But ‘a person whose name is not known, but whose mark is imitated, is just as much injured in his trade as if his name was known, as well as his mark. His mark, as used by him, has given a reputation to his goods. His trade depends greatly on such reputation. His mark sells his goods.’ ”

At the trial, we will show that the plaintiff, too, has a place of business in Burbank and that the products of the plaintiff have come to be identified by the “Big Boy” trade mark rather than by the corporate name. It thus becomes a question of fact whether the use of the defendants’ business name lessens the confusion or adds to it.

6. *The Issue of Bad Faith on the Part of the Defendants in Appropriating the “Big Boy” Mark.* Our complaint alleges, in effect, that the “Big Boy” trade mark was first used by the plaintiff in 1938 [Tr. Rec. p. 4, par. V]; that the defendants were familiar with the plaintiff’s operation and its trade mark long before they appropriated it some time after 1950 [Tr. Rec. p. 12, par. II; p. 9, par. XIV]; and that they appropriated the mark with the deliberate intention of benefiting from the plain-

tiff's good will. [Tr. Rec. p. 12, par. II.] These allegations were not lightly made; we expect to prove them. Certainly, nothing in the law requires that we allow to go unchallenged this intentional pirating of the good name that we have carefully built up over the years. The plaintiff's trade mark is not as well known as "RCA," and, as the defendants point out, it may not yet be as famous as "Stork Club." (Appellee Br. p. 15.) In one sense it stands only for a relatively insignificant item, a hamburger. But we would like to show in a trial the extent to which the public has come to recognize the "Big Boy" trade mark, affixed even to a hamburger, as representing a high standard of quality and service, first in Southern California, and now increasingly across the nation. [Tr. Rec. pp. 7-9, pars. XI and XII.] Justice Learned Hand might well have been talking about the plaintiff, when he wrote the following much-cited passage:

"However, it has of recent years been recognized that a merchant may have a sufficient economic interest in the use of his mark outside the field of his own exploitation to justify interposition by a court. His mark is his authentic seal; by it he vouches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner's reputation, whose quality no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask. And so it has come to be recognized that, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two, it is unlawful." (*Yale Electric Corporation v. Robertson*, 26 F. 2d 972, 974 (2nd Cir. 1928).)

In light of all of the foregoing, we submit that it cannot be said as a matter of law that “. . . the borrower’s use is so foreign to the owner’s as to insure against any identification of the two, . . . .”

The fact that the defendants took the plaintiff’s mark is, of itself, a strong indication of their belief that they could thereby capitalize on the plaintiff’s good will, and is evidence of a likelihood of confusion, as we indicated in our opening brief. (Appellant’s Br. pp. 22-24.) The defendants say that the fact of such intent “. . . is immaterial except in cases of actual competition or close business relationship.” (Appellee Br. p. 23.) Here again, the broad statement begs the very question at issue. Do the defendants mean that the presence of such intent is not even significant to justify a trial on the issue? If the defendants, themselves, thought the relationship was significantly close, how can this Court properly hold to the contrary, as a matter of law? We submit that the “significance” of this element in the case is one to be considered by a trier of fact.

“To use precisely the same mark, as the defendants have done, is, in our opinion, evidence of intention to make something out of it—either to get the benefit of the complainant’s reputation or of its advertisement or to forestall the extension of its trade. There is no other conceivable reason why they should have appropriated this precise mark.” (*Aunt Jemima Mills Co. v. Rigney & Co.*, 247 Fed. 407, 409 (2nd Cir. 1917).)

“The evidence is convincing that defendant made its choice of ‘Cotton Tips’ in order to come as close as it thought legally possible to ‘Q-Tips’ and bask in

the reflected popularity of plaintiff's name." (*Q-Tips, Inc. v. Johnson & Johnson*, 206 F. 2d 144, 147 (3rd Cir. 1953).)

We conclude this argument with an extremely applicable quotation from an opinion of this Court:

"There is no need for the appellees to appropriate the appellant's 'fanciful' or 'arbitrary' trade name. As was said by the Supreme Court of California in *Eastern Columbia, Inc. v. Waldman*, *supra*, 30 Cal. 2d at page 270, 181 P. 2d at page 867: 'Under these circumstances it is difficult to find any justification for permitting defendant to use those words at all in his business whether alone or in conjunction with other words. There is no commercial necessity for him to use them. They are not necessary to describe his business or the products he sells such as there might be if they had other than a fanciful meaning with no geographic significance.'

"This thought that a newcomer has an 'infinity' of other names to choose from without infringing upon a senior appropriation runs through the decisions like a leitmotiv.

"In *Florence Mfg. Co. v. J. C. Dowd & Co.*, *supra*, 2 Cir., 178 F. at page 75, we find a classical statement of the principle: 'It is so easy for the honest business man, who wishes to sell his goods upon their merits, to select from the entire material universe, which is before him, symbols, marks and coverings which by no possibility can cause confusion between his goods and those of competitors, that the courts look with suspicion upon one who, in dressing his goods for the market, approaches so near to his successful rival that the public may fail to distinguish between them.'

“And in Coca-Cola Co. v. Old Dominion Beverage Corporation, *supra*, 4 Cir., 271 F. at page 604: ‘plaintiff’s rights are limited at the most to two words. All the rest of infinity is open to defendant. It will be safe if it puts behind it the temptation to use in any fashion that which belongs to the plaintiff. It has not done so voluntarily, and compulsion must be applied.’ ” (*Stork Restaurant v. Sahati*, 166 F. 2d 348, 361 (9th Cir. 1948).)

## II.

### **The Complaint Does State a Claim Upon Which Relief May Be Granted.**

It was our intention to assert allegations in our complaint that properly raised all of the hereinabove discussed issues. The defendants contend that we failed to do so, and they now present certain technical objections to our pleading. Irrespective of the extent to which the Federal Rules of Civil Procedure may have reduced the standards of acceptable pleading, it is always our desire to set forth in a complaint a cause of action that is drawn to the best of our ability, and we naturally would have been glad to make any amendment consistent with the facts that the court below considered necessary or desirable. However, Judge Westover did not rule on any of the defendants’ technical objections, and in view of the attitude that he took concerning the case, as hereinabove discussed, it would have been idle to amend in order to satisfy the defendants’ technical contentions even if they had been well taken, which we believe they were not.

In any event, we submit that the following must be acknowledged:

1. Viewing the complaint in the light most favorable to the plaintiff, surely it could hardly be said that “. . . the claim for relief could not be sustained under any state of facts which could be proved in support of it.” Thus, it should not have been dismissed.

*Wooldridge Mfg. Co. v. R. G. La Tourneau, Inc.*,  
79 F. Supp. 908, 909 (N. D. Cal. 1948).

See also:

*Stauffer v. Exley*, 184 F. 2d 962 (9th Cir. 1950).

2. The complaint, at the very least, does “. . . indicate generally the type of litigation that is involved”; and it contains “. . . a generalized summary of the case that affords fair notice . . .,” which, according to the opinion in *Sunbeam Corp. v. Payless Drug Stores*, 113 F. Supp. 31, 37 (N. D. Cal. 1953), are all that Rule 8(a) requires.

### III.

#### Conclusion.

This case presents real factual issues that should be tried. In some aspects our case is stronger than were the situations in the decisions upon which we rely; in other respects, we will have to depend more upon our ability to present evidence of such compelling persuasiveness as to demonstrate clearly that fairness and equity require a decision in our favor. This is a battle that we must fight because our trademark is of great importance

to us and its appropriation by the defendants constitutes a threat to its continued value. In this court battle, to use the analogy of another type of encounter, we are perfectly willing to take our chances on being able to out-punch our opponent according to the rules; but we think it most unfair for the referee to raise our adversary's arm in victory before we have been allowed to climb into the ring.

Dated: September 29, 1955.

Respectfully submitted,

GRAY, BINKLEY & PFAELZER,

WILLIAM P. GRAY, and

MARTIN J. SCHNITZER,

*Attorneys for Appellant.*



No. 14724

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United States  
Court of Appeals  
for the Ninth Circuit

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HASKELL PLUMBING AND HEATING COM-  
PANY, a corporation, Appellant,

vs.

JIMMY WEEKS, TOMMY JUDSON, MIKE  
CULLINANE, OLE FRANZ, ROY CALLA-  
WAY, TOM MULCAHY, BEN HOLBROOK,  
JESSE HOBBS and W. VAN SMITH,  
Appellees.

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Transcript of Record

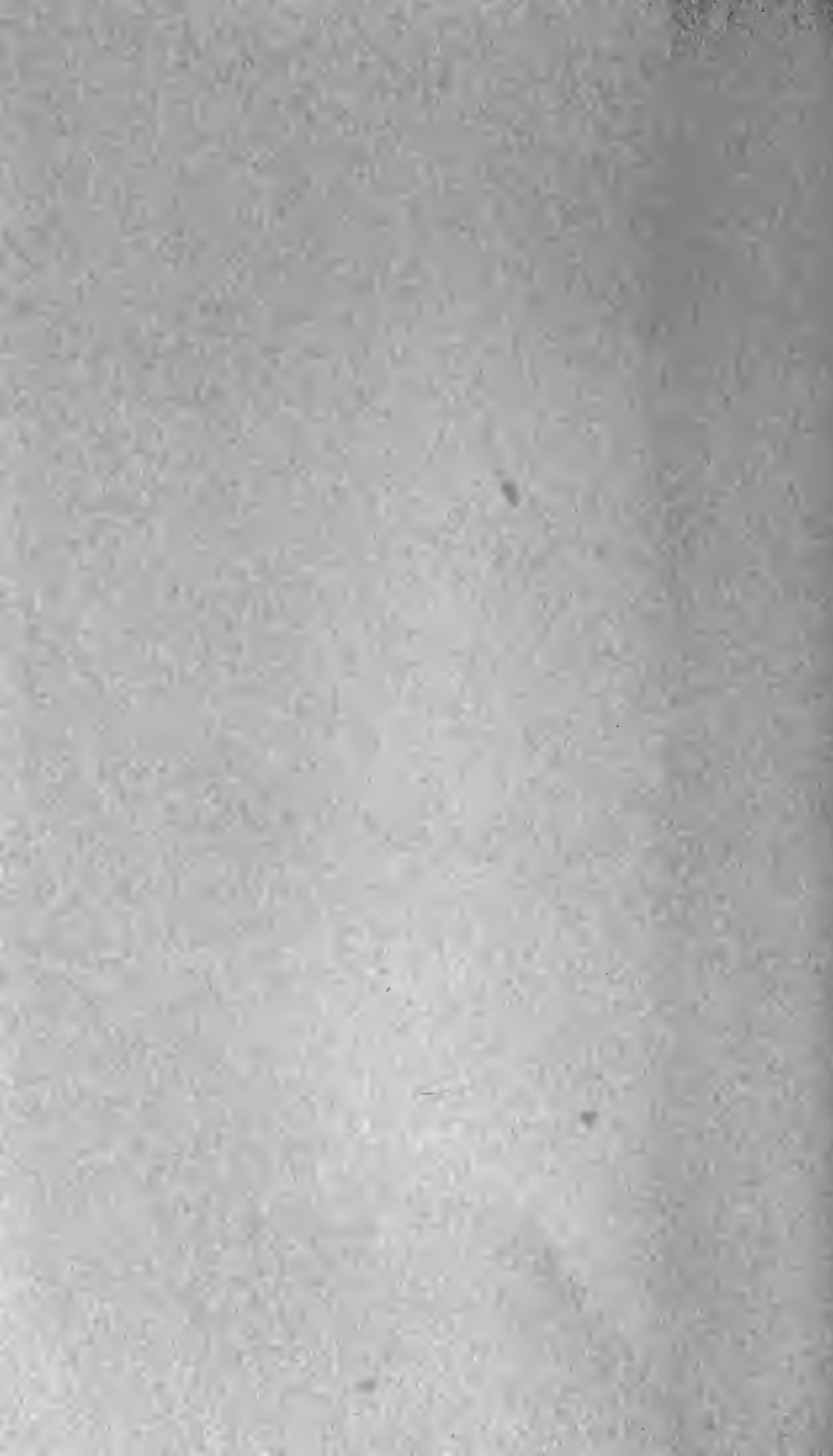
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Appeal from the District Court for the District of Alaska,  
Third Division

FILED

OCT 20 1955

PAUL P. O'BRIEN, CLERK



No. 14724

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United States  
Court of Appeals  
for the Ninth Circuit

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HASKELL PLUMBING AND HEATING COM-  
PANY, a corporation, Appellant,  
vs.

JIMMY WEEKS, TOMMY JUDSON, MIKE  
CULLINANE, OLE FRANZ, ROY CALLA-  
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JESSE HOBBS and W. VAN SMITH,  
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Transcript of Record

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Appeal from the District Court for the District of Alaska,  
Third Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

HAROLD J. BUTCHER,

P. O. Box 156,  
Anchorage, Alaska,

For Plaintiffs.

BAILEY E. BELL,  
BELL AND SANDERS,

P. O. Box 1599,  
Anchorage, Alaska,

For Defendants



In the District Court for the Territory of Alaska,  
Division Number Three at Anchorage

No. A-7736

JIMMY WEEKS, TOMMY JUDSON, MIKE  
CULLINANE, OLE FRANZ, ROY CALLA-  
WAY, TOM MULCAHY, BEN HOLBROOK,  
JESSE HOBBS and W. VAN SMITH,  
Plaintiffs,

vs.

HASKELL PLUMBING AND HEATING COM-  
PANY, INC., a Corporation authorized under  
the Laws of the State of Washington and doing  
business in the Territory of Alaska,  
Defendant.

## COMPLAINT

Come now the above named plaintiffs and for  
their cause of action against the above named de-  
fendant, complain and allege as follows:

### First Cause of Action

#### I.

That the above named plaintiff, Jimmy Weeks,  
was employed by the Haskell Plumbing and Heat-  
ing Company, Inc., to perform work at King Sal-  
mon, Alaska, in connection with a construction  
project of the United States Government.

#### II.

That the defendant named above is a corporation  
organized under the laws of the State of Washing-  
ton and authorized to do business in the Territory

of Alaska, and was at the time of the incident and injury hereinafter alleged, performing plumbing work in connection with a United States Government contract for construction of military facilities at King Salmon, Alaska.

### III.

That in addition to the standard wage furnished by the defendant to the plaintiff, an arrangement was made and included in the hire agreement as to the feeding and housing of the plaintiff, and in accordance with the terms of said subsistence agreement, the employee was provided space in a dormitory building maintained by the defendant, in which the plaintiff had his bed and a certain area of space surrounding said bed where he kept his personal property, consisting of luggage and such personal effects as will be hereinafter enumerated, and that said employee used said dormitory for sleeping purposes, recreational purposes, for rest and for storage purposes as aforesaid.

### IV.

That on or about the 11th day of October, 1951, shortly after the plaintiff had returned to work from his noon-day meal and while he was absent from the dormitory, a stove or other type heating unit in said dormitory exploded as a result of negligent maintenance of said stove on the part of defendant, causing hot burning oil and segments of live fire to be hurled through the dormitory with such intensity and force as to cause the entire building to burst into flame, and the building and its con-

tents were utterly consumed and destroyed within ten minutes from the time of the explosion.

### V.

That plaintiff was unable to remove from said building his personal effects, and they were all destroyed by the fire.

### VI.

That the plaintiff lost in said fire through the negligence of the defendant, items of personal property as follows, in the amounts indicated.

1 Suit .....	\$ 55.00
1 17-Jewel Watch .....	55.00
1 Electric Razor .....	25.50
1 Radio .....	75.00
3 Coats .....	50.00
1 Dress shoes .....	20.00
6 Dress shirts .....	30.00
2 Over-Shoes .....	10.00
Work Clothes .....	300.00
<hr/>	
Total damage .....	\$620.50

## Second Cause of Action

### I.

For the purposes of this Second Cause of Action, the plaintiff, Tommy Judson, adopts, affirms and incorporates all of the allegations of Paragraphs I, II, III, IV and V of the First Cause of Action.

### II.

That plaintiff Tommy Judson lost in said fire through the negligence of the defendant, items of

personal property as follows, in the amounts indicated.

1 Philson Suit .....	\$ 42.50
1 Shick Razor .....	25.00
1 Work Jacket .....	11.50
1 Wool Plaid Jacket .....	21.50
1 Gabardine Topcoat .....	50.00
4 Dress Shirts .....	12.00
1 Pr. Dress Shoes .....	18.00
1 Pr. Overshoes .....	8.00
1 Pr. Slippers .....	5.00
1 Navy Ring .....	45.00
1 Pr. Sun Glasses .....	15.00
1 Parker Pen Set .....	12.00
Work Clothes .....	300.00
1 Foot locker .....	20.00
1 Swansonite Suitcase .....	35.00
<hr/>	
Total damage .....	\$620.50

### Third Cause of Action

#### I.

For the purposes of this Third Cause of Action, the plaintiff, Mike Cullinane, adopts, affirms and incorporates all of the allegations of Paragraphs I, II, III, IV and V of the First Cause of Action.

#### II.

That plaintiff, Mike Cullinane, lost in said fire through the negligence of the defendant, items of personal property as follows, in the amounts indicated.

2 Suitcases .....	\$ 75.00
1 Benrus Wrist Watch .....	75.00
1 Argo Flex Camera .....	60.00
1 Parker pen set .....	29.00
1 Blue suit .....	95.00
1 Gabardine Suit .....	125.00
2 Pr. Dress Slacks .....	40.00
4 Dress shirts .....	16.00
2 Dress Garb. Shirts.....	30.00
1 Sport Jacket .....	25.00
1 Pr. Dress Shoes .....	20.00
1 Leather Toilet case.....	7.50
1 Remington Razor .....	22.00
Work clothes, including under- wear and socks .....	500.00

---

Total damage .....\$1,119.50

#### Fourth Cause of Action

##### I.

For the purposes of this Fourth Cause of Action, the plaintiff, Ole Franz, adopts, affirms and incorporates all of the allegations of Paragraphs I, II, III, IV and V of the First Cause of Action.

##### II.

That plaintiff Ole Franz lost in said fire through the negligence of the defendant, items of personal property as follows, in the amounts indicated.

1 Pr. Binoculars .....	\$100.00
1 Argus C-3 Camera.....	60.00
1 22 Auto Pistol .....	50.00

1 Electric Razor .....	20.00
1 Sun Glasses .....	15.00
1 21 Jewel Wrist Watch.....	120.00
1 Suit .....	80.00
2 Rings .....	200.00
1 17-Jewel Wrist Watch.....	50.00
1 Gold Nugget Tie Chain.....	75.00
1 Pen and Pencil Set.....	30.00
100 pounds work clothes.....	600.00

---

Total damage .....\$1,400.00

### Fifth Cause of Action

#### I.

For the purposes of this Fifth Cause of Action, the plaintiff, Roy Callaway, adopts, affirms and incorporates all of the allegations of Paragraphs I, II, III, IV and V of the First Cause of Action.

#### II.

That plaintiff Roy Callaway lost in said fire through the negligence of the defendant, items of personal property as follows, in the amounts indicated.

1 Dress Suit .....	\$125.00
1 Doz. Silk Shorts .....	21.00
1 Doz. Undershirts .....	16.20
4 Sweat Shirts .....	7.92
2 Pr. Wool Underwear .....	15.58
4 Pr. Wool work pants.....	35.80
9 ea. Wool work shirts.....	80.55
3 ea. Wool dress shirts.....	53.85
1 top coat .....	85.00



2 ea. work coats .....	55.90
3 ea. dress pants .....	82.50
1 Val-pack .....	30.00
1 ea. luggage .....	34.50
2 ea. sea bags .....	10.00
2 doz. wool work socks.....	38.16
1 doz. dress socks.....	16.68
2 pr. Dress shoes .....	59.90
2 pr. work shoes .....	35.00
2 ea. sweaters .....	30.00
1 ea. rubbers .....	15.00
1 Rolf's toilet kit .....	31.00
Toilet articles .....	45.00
1 ea. wrist watch .....	87.50
1 ea. vibrator .....	17.50
2 ea. dress belts .....	15.00
3 Pr. overhauls .....	17.37
1 Pr. dress gloves .....	15.75
8 Pr. work gloves .....	6.00
1 ea. alarm clock .....	9.85

---

Total damage .....\$1,093.51

### Sixth Cause of Action

#### I.

For the purposes of this Sixth Cause of Action, the plaintiff, Tom Mulcahy, adopts, affirms and incorporates all of the allegations of Paragraphs I, II, III, IV and V of the First Cause of Action.

#### II.

That plaintiff Tom Mulcahy lost in said fire through the negligence of the defendant, items of

personal property as follows, in the amounts indicated.

1 suit case .....	\$ 35.00
1 hand bag .....	20.00
1 suit clothes .....	85.00
1 overcoat .....	50.00
5 suits wool underwear.....	40.00
5 wool work shirts.....	20.00
2 dress shirts .....	16.00
8 pr. wool socks .....	8.00
1 fountain pen .....	15.00
1 Watch .....	45.00
1 16 Ga. Winchester .....	85.00
1 pr. hip boots .....	10.50
1 pr. leather boots .....	11.00
1 pr. shoe packs .....	8.00
1 Parker .....	20.00
1 Pr. Dress shoes .....	14.00
1 Vibrator .....	19.50
1 Remington razor .....	21.00
<hr/>	
Total damage .....	\$523.00

### Seventh Cause of Action

#### I.

For the purposes of this Seventh Cause of Action, the plaintiff, Ben Holbrook, adopts, affirms and incorporates all of the allegations of Paragraphs I, II, III, IV and V of the First Cause of Action.

#### II.

That plaintiff Ben Holbrook lost in said fire

through the negligence of the defendant, items of personal property as follows, in the amounts indicated.

1 Argus 35 MM. ....	\$ 65.00
Fishing equip. ....	120.00
1 Parker Pen set .....	37.00
1 suit case .....	40.00
1 traveling bag .....	19.00
1 pack sack .....	7.00
1 shaving kit .....	24.00
1 electric razor .....	22.00
Toiletries .....	5.00
1 pr. Russel Boots .....	37.00
1 pr. of work boots.....	18.00
1 pr. shoe packs .....	16.00
2 pr. dress shoes .....	28.00
2 suits clothes .....	150.00
6 dress shirts .....	80.00
8 pr. dress socks.....	26.00
1 dress jacket .....	65.00
1 top coat .....	55.00
2 pr. slacks .....	38.00
1 pr. dress gloves .....	6.00
9 pr. underwear .....	18.00
2 prs. winter underwear.....	20.00
9 pr. wool stockings .....	17.00
2 doz. work gloves.....	14.00
1 work hat .....	2.00
4 sweat shirts .....	14.00
10 work socks .....	10.00
3 pr. work pants .....	18.00
1 dress sweater .....	10.00

5 work shirts .....	20.00
1 belt .....	16.00
3 prs. coverall .....	21.00
Films .....	40.00

---

Total damage .....\$1,078.00

### Eighth Cause of Action

#### I.

For the purposes of this Eighth Cause of Action, the plaintiff, Jesse Hobbs, adopts, affirms and incorporates all of the allegations of Paragraphs I, II, III, IV and V of the First Cause of Action.

#### II.

That plaintiff Jesse Hobbs lost in said fire through the negligence of the defendant, items of personal property as follows, in the amounts indicated.

1 suit case .....	\$ 35.00
1 traveling bag .....	20.00
1 pack sack .....	8.00
1 shaving kit .....	16.00
1 Remington Razor .....	22.00
Toiletries .....	6.00
1 pr. slippers .....	7.00
3 prs. oxfords .....	30.00
1 pr. work boots .....	18.00
1 pr. shoe packs .....	14.00
1 suit of clothes .....	80.00
3 dress shirts .....	30.00
12 prs. dress socks .....	15.00

1 top coat .....	60.00
2 prs. dress gloves .....	15.00
6 prs. summer underwear.....	18.00
3 prs. winter underwear .....	36.00
8 prs. wool stockings.....	16.00
4 prs. light stockings.....	3.00
4 pr. work pants .....	28.00
6 wool work shirts .....	50.00
4 sweat shirts .....	16.00
1 dress sweater .....	12.00
1 doz. work gloves.....	12.00
1 Stetson hat .....	15.00
2 work hats .....	5.00
1 Alpaca Jacket .....	24.00
1 Parker .....	35.00
Belt, suspenders, Cig. lighter, etc. ....	20.00
Upper and lower partial plates .....	180.00
Fishing equipment .....	60.00
3 prs. coveralls .....	24.00
<hr/>	
Total damage .....	\$930.00

### Ninth Cause of Action

#### I.

For the purposes of this Ninth Cause of Action, the plaintiff, W. Van Smith, adopts, affirms and incorporates all of the allegations of Paragraphs I, II, III, IV and V of the First Cause of Action.

## II.

That plaintiff W. Van Smith lost in said fire through the negligence of the defendant, items of personal property as follows, in the amounts indicated.

1 Samsonite bag .....	\$ 27.50
1 Foot locker .....	16.00
1 Zenith Trans-Oceanic Radio.	142.00
1 Remington Electric Razor...	22.50
1 Sheaffer Pen and Pencil.....	17.50
1 Ronson Lighter .....	8.50
1 Model 70 Winchester Rifle with scope and case.....	180.00
1 Argus C3 camera with case..	63.50
Misc. fishing tackle .....	75.00
1 Westelox travalarm clock....	7.50
Misc. work clothes .....	300.00
1 Tweed Suit .....	85.00
1 Gabardine suit .....	100.00
Misc. toilet articles .....	10.00
1 pr. dress slacks .....	20.00
1 sport jacket .....	27.50
2 sport shirts .....	18.00
1 pr. dress shoes .....	22.50
<hr/>	
Total damage .....	\$1,143.00

That the foregoing plaintiffs have been compelled to retain the services of an attorney for prosecution of this action, and the reasonable fee for said attorney's services is the sum of \$1,000.00.

Wherefore, the above named plaintiffs pray this Honorable Court for judgment as follows:

1. Judgment for Jimmy Weeks in the sum of \$620.50.

2. Judgment for Tommy Judson in the sum of \$620.50.

3. Judgment for Mike Cullinane in the sum of \$1,119.50.

4. Judgment for Ole Franz in the sum of \$1,-400.00.

5. Judgment for Roy Callaway in the sum of \$1,093.51.

6. Judgment for Tom Mulcahy in the sum of \$523.00.

7. Judgment for Ben Holbrook in the sum of \$1,078.00.

8. Judgment for Jesse Hobbs in the sum of \$930.00.

9. Judgment for W. Van Smith in the sum of \$1,143.00.

10. For attorney's fee in the sum of \$1,000.00.

11. For costs in this action incurred.

12. For such other relief as to this Honorable Court seems equitable and just in the premises.

/s/ HAROLD J. BUTCHER,  
Attorney for Plaintiffs

Duly Verified.

[Endorsed]: Filed May 17, 1952.

[Title of District Court and Cause.]

### MOTION TO DISMISS AND TO STRIKE

Comes now the defendant, Haskell Plumbing and Heating Company, Inc., a Corporation, and moves to dismiss the many causes of action set forth and pleaded in the Complaint filed herein, or if the Court refuses to dismiss said action, then to dismiss all causes of action other than the one first stated by Jimmy Weeks, the plaintiff first named, and also moves to strike from the Complaint all causes of action other than Cause of Action No. I, and for grounds of this motion states that there is a misjoinder of parties plaintiff in this matter and a misjoinder of causes of action in that there is a large number of plaintiffs named in said Complaint who are, according to the pleadings, not associated together, are not partners, and are not joint claimants, and have no legal connection whatsoever, and are not connected in any way, and are attempting to file a multiple suit against the defendant, which is not authorized by law or by Rules 19 or 20 of the Federal Rules of Civil Procedure, as said actions are not anticipated or covered by said rules, and the defendant could not have a fair and impartial trial in an action such as is set forth in the Complaint; that this is a jury case and would be confused to the jury beyond correction by the Court, and should therefore be dismissed, or all causes of action other than Cause of Action No. I should be dismissed, or all causes of action and all allegations other than Cause of Action No. I should be stricken.



For the further reason that none of the causes of action attempted to be pleaded herein state a cause of action upon which any relief should be granted to any of the plaintiffs, and this subdivision of the motion applies to each cause of action stated in the Complaint.

Wherefore, defendant moves the Court to dismiss said suit in its entirety, or in the alternative, to dismiss all causes of action attempted to be pleaded against the defendant other than Cause of Action No. I, or that all causes of action, other than Cause of Action No. I, be stricken from the pleadings and that each and every cause of action be dismissed for failure to state a cause of action in favor of any plaintiff and against the defendant.

Dated at Anchorage, Alaska, this 15th day of April, 1953.

BELL & SANDERS,  
/s/ By BAILEY E. BELL,  
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed April 15, 1953.

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[Title of District Court and Cause.]

## HEARING ON MOTION TO DISMISS AND TO STRIKE

Now at this time hearing on motion to dismiss and to strike in cause No. A-7736, entitled Jimmy Weeks, Tommy Judson, Mike Cullinane, Ole Franz,

Roy Callaway, Tom Mulcahy, Ben Holbrook, Jesse Hobbs and W. Van Smith, Plaintiffs, versus Haskell Plumbing and Heating Company, Inc., a corporation authorized under the Laws of the State of Washington and doing business in the Territory of Alaska, Defendant, came on regularly before the Court, Harold J. Butcher, appearing for and in behalf of the plaintiff and William Sanders appearing for and in behalf of the defendant.

Argument was had to the Court by both sides.

Whereupon the Court having heard the arguments of respective counsel and being fully and duly advised in the premises, announced that motion denied and defendant granted 20 days to answer.

Entered April 24, 1953.

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[Title of District Court and Cause.]

## ANSWER

Comes now the above named Defendant, Haskell Plumbing and Heating Company, Inc., a corporation, and for answer to the Plaintiffs' Complaint filed herein, admits, denies and alleges as follows, to-wit:

Answer to First Cause of Action

### I.

Defendant is not sufficiently informed at this time so as to form an opinion as to the truth of the allegations in the first paragraph of the First Cause

of Action, and therefore, denies said allegations and the whole thereof.

## II.

Defendant admits the allegations of the second paragraph of Plaintiffs' First Cause of Action.

## III.

Defendant denies the allegations of the third paragraph of the First Cause of Action, and the whole thereof.

## IV.

Defendant denies the allegations in the fourth paragraph of the First Cause of Action, and the whole thereof.

## V.

Defendant is not sufficiently advised so as to form an opinion as to the truth or falsity of the allegations in Paragraph V of the First Cause of Action, and therefore, denies said allegations and the whole thereof.

## VI.

Defendant denies the allegations of Paragraph VI of the First Cause of Action and the whole thereof.

## Answer to Second Cause of Action

### I.

Defendant adopts the allegations of the first five (5) paragraphs of its answer to the Plaintiffs' First Cause of Action, and makes the same a part of this its Answer to Plaintiffs' Second Cause of Action, set forth in said Complaint, and in addition thereto

denies all of the allegations set forth in the Second Cause of Action, and the whole thereof.

Answer to Third Cause of Action

I.

Defendant for answer to the Third Cause of Action set forth in Plaintiffs' Complaint, adopts all of the first five (5) paragraphs in its Answer to the First Cause of Action, and in addition thereto denies each and every allegation in said Third Cause of Action, and the whole thereof.

Answer to Fourth Cause of Action

I.

Defendant for answer to the Fourth Cause of Action set forth in Plaintiffs' Complaint, adopts all of the first five (5) paragraphs in its Answer to the First Cause of Action, and in addition thereto, denies each and every allegation in said Fourth Cause of Action, and the whole thereof.

Answer to Fifth Cause of Action

I.

Defendant, for answer to the Fifth Cause of Action set forth in Plaintiffs' Complaint, adopts all of the first five (5) paragraphs in its Answer to the First Cause of Action, and in addition thereto, denies each and every allegation in said Fifth Cause of Action, and the whole thereof.

Answer to Sixth Cause of Action

I.

Defendant, for answer to the Sixth Cause of Action set forth in Plaintiffs' Complaint, adopts all

of the first five (5) paragraphs in its Answer to the First Cause of Action, and in addition thereto, denies each and every allegation in said Sixth Cause of Action, and the whole thereof.

### Answer to Seventh Cause of Action

#### I.

Defendant, for answer to the Seventh Cause of Action set forth in Plaintiffs' Complaint, adopts all of the first five (5) paragraphs in its Answer to the First Cause of Action, and in addition thereto, denies each and every allegation in said Seventh Cause of Action, and the whole thereof.

### Answer to Eighth Cause of Action

#### I.

Defendant, for answer to the Eighth Cause of Action set forth in Plaintiffs' Complaint, adopts all of the first five (5) paragraphs in its Answer to the First Cause of Action, and in addition thereto, denies each and every allegation in the said Eighth Cause of Action, and the whole thereof.

### Answer to Ninth Cause of Action

#### I.

Defendant, for answer to the Ninth Cause of Action set forth in Plaintiffs' Complaint, adopts all of the first five (5) paragraphs in its Answer to the First Cause of Action, and in addition thereto, denies each and every allegation in said Ninth Cause of Action, and the whole thereof.

Wherefore, Defendant having fully answered Plaintiffs' Complaint, prays that each and all of the above named Plaintiffs' recover nothing thereby, and that the purported causes of action be dismissed; and that this Defendant recover judgment against each and all of the above named Plaintiffs on each and all of the separate causes of action set forth therein; and that this Defendant recover its costs and attorneys fees in this action.

Dated at Anchorage, Alaska, this 6th day of May, 1953.

BELL & SANDERS,  
/s/ By BAILEY E. BELL,  
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed May 7, 1953.

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[Title of District Court and Cause.]

## INTERROGATORIES PROPOUNDED BY DEFENDANT AND ANSWERS THERETO

Comes now the defendant Haskell Plumbing and Heating Company, Inc., a Corporation, acting by and through its attorneys, Bell & Sanders, and pursuant to Rule 33, Federal Rules of Civil Procedure, submit the following interrogatories to be answered in writing under oath by one of the plaintiffs, Jimmy Weeks, within fifteen days from the date of service hereof.

1. Please state your full name.

A. Gaylord Wilfred Weeks.

2. Please state your complete present address.

A. Local 367, United Assn. Plumbers, Steamfitters, Carpenters Hall, 4th Street at Denali, Anchorage, Alaska.

3. Please state your residence address as of the 17th day of May, 1952.

A. Same address as above.

4. For whom were you working on the 11th day of October, 1951?

A. Haskell Plumbing and Heating Company.

5. Where were you living on that date?

A. The Plumbers Bunkhouse at King Salmon, Alaska.

6. How many men were living in the same place at that time?

A. I believe there were eleven men there.

7. Please give me an exact list of the names and addresses of the men who were living there at that time.

A. I do not know the addresses of the men, and cannot recall the names of the other men in addition to the ones named above.

8. Was there a fire that took place on that date?

A. Yes.

9. What were you doing on the 11th day of October, 1951?

A. I was at work on the main construction job.

10. What time of day was it that the fire took place?

A. Approximately at 1:00 p.m.

11. Do you know the name of any men or women who were in the alleged dormitory immediately

preceding the explosion referred to in your Complaint?

A. I do not know them.

12. What was the man's name and his address, if any, whose duty it was to take care of the stove or heating unit in said dormitory on the said 11th day of October, 1951?

A. I do not know.

13. Where was said man at that time?

A. I do not know.

14. Do you know anything about the kind of a stove or the type of heating unit that was used?

A. There were two Space Heaters there, Oil fired.

15. Did you ever have anything to do with the maintenance of said stove or heating unit? If so, state what experience you had along that line.

A. No, I did not.

16. Do you know of anyone who saw any explosion in the dormitory on the said 11th day of October, 1951?

A. I do not.

17. If your answer is Yes, please give us the name and address of the party who saw it.

A. See previous answer.

18. When did you first learn of the fact that there was a fire in the dormitory building?

A. Approximately 1:30 p.m. same date.

19. How did you learn about it?

A. Mr. Mulcahy told me.

20. How soon thereafter did you go to the dormitory?



A. Immediately.

21. What did you do after you arrived there?

A. I stood and looked at the ruins.

22. What did you say or hear said at that time?

A. I do not remember.

23. How long had you been living in that place?

A. About four months.

24. What was the date of your coming to Alaska during the year 1951?

A. I do not remember.

25. How did you come to Alaska?

A. Personal Automobile.

26. If you came by plane, please give us the name of the company with whom you rode?

A. See above.

27. Where did you board said plane?

A. See above.

28. If you didn't come by plane, please state how you did come and the date of your arrival.

A. Already answered.

29. Do you know who owned the building that you lost your property in by reason of the fire mentioned in your suit?

A. No.

30. What connection, if any, did Haskell Plumbing and Heating Company, Inc., have with relation to the building that was burned?

A. It is my belief that Haskell Plumbing and Heating, Inc., had control and had charge of the burned building.

31. Did Haskell Plumbing and Heating Company, Inc. own any interest in the building?

A. I do not know.

32. Who furnished you quarters there and what did you pay for the quarters?

A. Haskell Plumbing and Heating, Inc. \$45.70 Week.

33. What was furnished with the quarters? Did you have any utilities furnished or did you and the other men occupying the quarters pay for the utilities?

A. Board was furnished for that amount, Utilities were furnished.

34. What kind of a building was it that was destroyed by fire?

A. Bunkhouse, Quonsett type.

35. Did you pay Haskell Plumbing and Heating Company, Inc. anything for living in the building?

A. Answered above. (Haskell Plumbing and Heating, Inc.)

36. Was there a fire department of any kind came to the fire while it was still burning?

A. No.

37. If your answer is Yes, please state who was in charge of that fire department.

A. See above.

38. Who furnished the oil for the heating of the building you referred to in your Complaint?

A. I do not know.

39. Where was this oil purchased and by whom was it delivered?

A. I do not know.

40. You have alleged the loss of one suit. Where did you buy this suit, from whom did you buy it,

what did you pay for it, what color was it, how long had you worn it?

A. Suit, Man's, Brown color, bought in February previously, in Evansville, Ind. I do not recall the name of the store. I paid \$100.00 approximately.

41. You have alleged the loss of a 17 jewel watch. What was the make of this watch? Please give us a full description of it, from whom did you purchase it, when did you purchase it? Please give the address of the person or corporation from whom you purchased it, and please state the amount you paid for it.

A. I paid \$55.00 for this watch at Rossville, Indiana, bought in January of the same year, 1951. It was a 17-jewel pocket watch, silver case. I do not recall the brand of it.

42. You have alleged the loss of an electric razor. Please state the kind of razor it was—the name thereof, from whom you purchased it, and what is the address of the place you purchased it? What date did you purchase it, what did you pay for this electric razor?

A. Remington, DeLuxe, purchased in Anchorage next door to the Oyster Loaf Cafe on 4th Avenue. I paid approximately \$27.50. It was bought sometime in March, 1951.

43. From whom did you purchase the radio referred to in your Complaint? What kind of Radio was it? Was it in working condition at the time of the fire? What is the address of the person from whom you purchased this radio? What did you pay

for the radio when you purchased it and on what date did you purchase it?

A. It was an International (non-Portable type) bought from a little Radio Shop in Anchorage, Alaska, on D Street between 4th and 5th on or about the 15th of September, 1951. I paid \$75.00 for it.

44. Please describe the three coats that you claim to have lost in the fire. Please give the name and address from whom you purchased each of the coats. Please give the price paid therefor. Please give the date or approximate date of the purchase thereof. Please state whether or not they were extensively used prior to the fire.

A. 1 Sport coat, red color, man's, bought 1 year before. 1 Sport coat, brown checked, man's, bought about the same time. 1 Sport jacket, green color, man's, bought at about the same time. I do not recall at this time where I bought these, but it is my opinion that they cost me approximately \$20.00 apiece.

45. You have sued for one pair of dress shoes. Please describe the dress shoes, state the name and address from whom they were purchased, the approximate date they were purchased. Please state the price you paid therefor. Please state the kind and trade name of said shoes.

A. 1 pair of brown color Oxford type Dress shoes, size 8½. I do not recall the brand name of these shoes. I bought them at the same time as I bought the within mentioned suit, at the same location, and in my opinion the price paid was \$20.00.

46. Please state how many dress shirts you had burned in this fire, describe the dress shirts that were burned. Please state the name and address where you purchased said shirts, state the price you paid therefor, and state the length of time you had worn these shirts. Please state the design and color thereof.

A. 6 Dress shirts at \$5.00 apiece. I do not remember exactly where I bought them.

47. State the kind and description of the work clothes that you claim were burned, state from whom and the address of whom you purchased these work clothes, furnishing a list thereof. Please state the price you paid for each article. Please state the length of time you had owned and used these work clothes.

A. They were ordinary work clothes, consisting of underwear, pants, overalls, shoes, overshoes, work coats, work jackets, work caps and gloves, etc., which I had accumulated in the last year or two and which were necessary in the kind of work I was performing, and it is my opinion it would require about \$300.00 to replace the quality in the amount lost.

48. Please state what negligence the defendant Haskell Plumbing and Heating Company committed by which you claim it liable to respond in damages.

A. It was the general impression among the men gathered around the fire that the heating unit had exploded and set the dormitory on fire; and, inasmuch as Haskell Plumbing and Heating Company,

Inc., provided us with housing in this dormitory and took care of the heat, the negligence which caused the explosion would be their negligence.

[Printer's Note: The Interrogatories are all signed Bell & Sanders by Bailey E. Bell and filed July 20, 1953. The Answers are signed and verified by the different Plaintiffs and filed April 2, 1954.]

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[Title of District Court and Cause.]

### INTERROGATORIES PROPOUNDED BY DEFENDANT AND ANSWERS THERETO

Comes now the defendant Haskell Plumbing and Heating Company, Inc., a Corporation, acting by and through its attorneys, Bell & Sanders, and pursuant to Rule 33, Federal Rules of Civil Procedure, submit the following interrogatories to be answered in writing under oath by one of the plaintiffs, Tommy Judson, within fifteen days from the date of service hereof.

1. Please state your full name.  
A. Thomas B. Judson.
2. Please state your complete present address.  
A. 326 - 11th Avenue, Anchorage.
3. Please state your residence address as of the 17th day of May, 1952.  
A. Anchorage, Alaska.
4. For whom were you working on the 11th day of October, 1951?

A. Haskell Plumbing & Heating Company, Inc.

5. Where were you living on that date?

A. Haskell Plumbing & Heating Company dormitory at King Salmon, Alaska.

6. How many men were living in the same place at that time?

A. To the best of my belief, 12 men.

7. Please give me an exact list of the names and addresses of the men who were living there at that time.

A. To my best recollection, the men living in the barracks, and the only addresses known to me, were as follows:

Jimmy Weeks, King Salmon, Alaska.

Mike Cullinane, King Salmon, Alaska.

Ole Franz, King Salmon, Alaska.

Roy Callaway, King Salmon, Alaska.

Tom Mulcahy, King Salmon, Alaska.

Ben Holbrook, King Salmon, Alaska.

Jesse Hobbs, King Salmon, Alaska.

W. Van Smith, King Salmon, Alaska.

Myself, Tommy Judson, King Salmon, Alaska.

I do not know the names of the other three men, and the only addresses I ever knew for them was King Salmon, Alaska.

8. Was there a fire that took place on that date?

A. Yes.

9. What were you doing on the 11th day of October, 1951?

A. I was working on a diesel cooling system, located approximately 1 mile from the fire.

10. What time of day was it that the fire took place?

A. Approximately 1:15.

11. Do you know the name of any men or women who were in the alleged dormitory immediately preceding the explosion referred to in your Complaint?

A. I know of no one who was in the dormitory at that time.

12. What was the man's name and his address, if any, whose duty it was to take care of the stove or heating unit in said dormitory on the said 11th day of October, 1951?

A. There was a bull cook, whose name I do not recall, who was responsible for keeping the fire in the heating unit.

13. Where was said man at that time?

A. I have no knowledge of his whereabouts.

14. Do you know anything about the kind of a stove or the type of heating unit that was used?

A. Just an ordinary oil-burning heating unit.

15. Did you ever have anything to do with the maintenance of said stove or heating unit? If so, state what experience you had along that line.

A. No.

16. Do you know of anyone who saw any explosion in the dormitory on the said 11th day of October, 1951?

A. No.

17. If your answer is Yes, please give us the name and address of the party who saw it.

A. See previous answers.



18. When did you first learn of the fact that there was a fire in the dormitory building?

A. Approximately 1:30.

19. How did you learn about it?

A. Foreman Mulcahy came by in a truck and told me the barracks were on fire.

20. How soon thereafter did you go to the dormitory?

A. Immediately.

21. What did you do after you arrived there?

A. Upon my arrival, the building was almost disintegrated, and the heat was so great that we could not approach the fire.

22. What did you say or hear said at that time?

A. I said, "I don't see how it could have happened so fast."

23. How long had you been living in that place?

A. Approximately six weeks.

24. What was the date of your coming to Alaska during the year 1951?

A. I never came to Alaska.

25. How did you come to Alaska?

A. See previous answer.

26. If you came by plane, please give us the name of the company with whom you rode?

A. See previous answers.

27. Where did you board said plane?

A. See previous answers.

28. If you didn't come by plane, please state how you did come and the date of your arrival.

A. See previous answers.

29. Do you know who owned the building that

you lost your property in by reason of the fire mentioned in your suit?

A. No.

30. What connection, if any, did Haskell Plumbing and Heating Company, Inc., have with relation to the building that was burned?

A. Haskell Plumbing & Heating Co., Inc. furnished the barracks, assigned us to beds therein, and required that we live there.

31. Did Haskell Plumbing and Heating Company, Inc. own any interest in the building?

A. I do not know.

32. Who furnished you quarters there and what did you pay for the quarters?

A. Haskell Plumbing & Heating Company, Inc., furnished the quarters and board as part of our hire agreement.

33. What was furnished with the quarters? Did you have any utilities furnished or did you and the other men occupying the quarters pay for the utilities?

A. Everything was furnished by Haskell Plumbing & Heating Company, Inc.

34. What kind of a building was it that was destroyed by fire?

A. Quonset hut.

35. Did you pay Haskell Plumbing and Heating Company, Inc. anything for living in the building?

A. No.

36. Was there a fire department of any kind came to the fire while it was still burning?

A. Yes.

37. If your answer is Yes, please state who was in charge of that fire department.

A. Fire equipment was in charge of U. S. Army.

38. Who furnished the oil for the heating of the building you referred to in your Complaint?

A. Haskell Plumbing & Heating Company, Inc., to the best of my knowledge.

39. Where was this oil purchased and by whom was it delivered?

A. I have no knowledge of who delivered the oil or from where it was purchased.

40. You have alleged the loss of one suit. Where did you buy this suit, from whom did you buy it, what did you pay for it, what color was it, how long had you worn it?

A. This was a Philson, Alaskan tuxedo, green in color. I purchased it at Rutherford's Anchorage, in 1950, and paid \$42.50 for it.

41. You have alleged the loss of an electric razor. Please state from whom you purchased it and when you purchased it. Please give the address of the person or corporation from whom you purchased it, and please state the amount you paid for it.

A. This was a Schick razor, which I bought from the clerk at Cape Newenham, who sent to Bremerton, Washington, for it. I paid him about \$25.00 for it.

42. You have alleged the loss of a work jacket. Please state the name and address from whom you purchased it, please give the price paid therefor. Please give the date or approximate date of the

purchase thereof. Please state whether or not it was used extensively prior to the fire.

A. This was a mouton army jacket purchased at a war surplus store in Anchorage. I paid \$11.50 for it and had had it two or three months.

43. You have alleged the loss of a wool plaid jacket. Where did you buy this jacket, from whom did you buy it, what did you pay for it, how long had you worn it?

A. This was a green and white cruiser jumper. I think I purchased it at Rutherford's, but am not sure. I paid \$21.50 for it, and had had it a few months. I had worn it infrequently.

44. You have alleged the loss of one gabardine topcoat. Where did you buy this topcoat, from whom did you buy it, what did you pay for it, what color was it, how long had you worn it?

A. I bought this gabardine topcoat in Anchorage at one of the shops on 4th Avenue—Rutherford's, I. Bayles, Hopkins, Koslosky's, the Hub—I do not recall which. This was in the fall of 1950, and I know that I paid \$50.00 for it, and wore it only when I was dressed up, which was not often.

45. Please describe the four dress shirts that you claim to have lost in the fire. Please give the name and address from whom you purchased each of the shirts. Please give the price paid therefor. Please give the date or approximate date of the purchase thereof. Please state whether or not they were extensively used prior to the fire.

A. These four dress shirts were tan, blue, green and white, and were bought at various times in

1951. I paid approximately \$3.00 apiece for them, but do not remember where they were purchased. Had worn them once or twice each.

46. You have sued for one paid of dress shoes. Please describe the dress shoes, state the name and address from whom they were purchased, the approximate date they were purchased. Please state the price you paid therefor. Please state the kind and trade name of said shoes.

A. These were brown dress shoes purchased, to my best recollection from Rutherford's in Anchorage, Alaska, during the summer of 1951. Paid \$18.00 to my best recollection. I do not recall the brand, but believe they were Florsheims.

47. You have sued for one pair of overshoes. Please describe the overshoes, state the name and address from whom they were purchased, the approximate date they were purchased. Please state the price you paid therefor. Please state the kind and trade name of said overshoes.

A. To my best recollection, these overshoes were purchased from Rutherford's. They were black rubber, zipper type. Paid \$8.00 for them. Do not know the brand or trade name of said overshoes.

48. You have sued for one Navy ring. Please give us a full description of it. From whom did you purchase it, and when did you purchase it? Please give the address of the person or corporation from whom you purchased it, and please state the amount you paid for it.

A. This was a large insignia ring, solid gold, for which I paid \$45.00 when I was in the Navy in about

the year 1944. I do not recall from whom I purchased said ring.

49. You have sued for one paid of sun glasses. From whom were they purchased? When were they purchased? Please give the name of the person or corporation from whom you purchased them, and please state the amount you paid therefor.

A. These were Polaroid type, high-class sunglasses, purchased while I was in the Navy, approximately in 1944. It is my recollection that I paid \$15.00 for them, and I had worn them often, but they remained in first-class condition.

50. You have sued for one Parker Pen set. Please give a full description of it. From whom did you purchase it, and when did you purchase it? Please give the address of the person or corporation from whom you purchased it, and please state the amount you paid for it.

A. This was a Parker pen set and a gift from my mother, given to me about Christmas of 1949. Both pen and pencil were in good condition, and used infrequently. I have compared similar sets, which have a value of \$25.00.

51. State the kind and description of the work clothes that you claim were burned, state from whom and the address of whom you purchased these work clothes, furnishing a list thereof. Please state the price you paid for each article. Please state the length of time you had owned and used these work clothes.

A. I lost better than \$300.00 worth of work clothes. These consisted of numerous pairs of over-

alls, work pants, heavy underwear, socks, work shoes, jackets and work gloves, purchased to the best of my recollection at various stores and commissaries in Juneau and Anchorage. I do not recall exactly where these items were purchased, but I do know there was in excess of \$300.00 worth. If I were required to purchase said work clothes in the quantity and quality of those I had at the time of the loss, it would cost me in excess of \$300.00 to do so.

52. Please describe in full the foot locker and Swansonite suitcase you alleged were lost in the fire. Please give the name, address and purchase price of each article.

A. To the best of my recollection, I purchased the Swansonite suitcase in Juneau in about 1948, paying \$35.00 for the same. I do not know from what store I bought it, but it was one of the regular merchants on the main street. The foot locker I purchased in Anchorage at a war surplus store. It was new when I bought it and I paid \$20.00. I had had it approximately one year and it was in good condition.

53. Please state what negligence the defendant Haskell Plumbing and Heating Company committed by which you claim it liable to respond in damages.

A. We were furnished living quarters by the defendant and a place to live in, with bed, hooks and hangers and place in which to store our personal effects; and it was the duty of the defendant to keep said quarters safe, and the barracks burned as the result of an explosion in the heating unit, which

heating unit was under the control of the defendant.

[Printer's Note: The Interrogatories are all signed Bell & Sanders by Bailey E. Bell and filed July 20, 1953. The Answers are signed and verified by the different Plaintiffs and filed April 2, 1954.]

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[Title of District Court and Cause.]

### INTERROGATORIES PROPOUNDED BY DEFENDANT AND ANSWERS THERETO

Comes now the defendant Haskell Plumbing and Heating Company, Inc., a Corporation, acting by and through its attorneys, Bell & Sanders, and pursuant to Rule 33, Federal Rules of Civil Procedure, submit the following interrogatories to be answered in writing under oath by one of the plaintiffs, Mike Cullinane, within fifteen days from the date of service hereof.

1. Please state your full name.

A. Michael Emmett Cullinane.

2. Please state your complete present address.

A. 440 D. Street, Anchorage, Alaska.

3. Please state your residence address as of the 17th day of May, 1952.

A. Either in Anchorage or Kenai.

4. For whom were you working on the 11th day of October, 1951?

A. Haskell Plumbing and Heating Company, Inc.



5. Where were you living on that date?

A. Living in quarters provided for us by Haskell Plumbing & Heating Company at King Salmon.

6. How many men were living in the same place at that time?

A. I don't recall exactly—about eleven, maybe.

7. Please give me an exact list of the names and addresses of the men who were living there at that time.

A. To my best recollection, the men living in the barracks were:

Jimmy Weeks—only address known to me was King Salmon, Alaska.

Tommy Judson—only address known to me was King Salmon, Alaska.

Ole Franz—only address known to me was King Salmon, Alaska.

Roy Callaway—only address known to me was King Salmon, Alaska.

Ben Holbrook—only address known to me was King Salmon, Alaska.

Jesse Hobbs—only address known to me was King Salmon, Alaska.

W. Van Smith—only address known to me was King Salmon, Alaska.

I do not know the names of the other men.

8. Was there a fire that took place on that date?

A. Yes.

9. What were you doing on the 11th day of October, 1951?

A. Working in generator room at powerhouse at base.

10. What time of day was it that the fire took place?

A. Shortly after lunch.

11. Do you know the name of any men or women who were in the alleged dormitory immediately preceding the explosion referred to in your Complaint?

A. No.

12. What was the man's name and his address, if any, whose duty it was to take care of the stove or heating unit in said dormitory on the said 11th day of October, 1951?

A. It was the duty of the bull cook. I don't remember his name.

13. Where was said man at that time?

A. I do not know.

14. Do you know anything about the kind of a stove or the type of heating unit that was used?

A. Two big space heaters.

15. Did you ever have anything to do with the maintenance of said stove or heating unit? If so, state what experience you had along that line.

A. No.

16. Do you know of anyone who saw any explosion in the dormitory on the said 11th day of October, 1951?

A. No.

17. If your answer is Yes, please give us the name and address of the party who saw it.

A. See previous answer.

18. When did you first learn of the fact that there was a fire in the dormitory building?

A. Shortly after lunch.

19. How did you learn about it?

A. The foreman came over to where I was working and told us.

20. How soon thereafter did you go to the dormitory?

A. Immediately.

21. What did you do after you arrived there?

A. We looked at the fire.

22. What did you say or hear said at that time?

A. I cannot recall at this time.

23. How long had you been living in that place?

A. Approximately three months.

24. What was the date of your coming to Alaska during the year 1951?

A. I did not come to Alaska during the year 1951.

25. How did you come to Alaska?

A. By plane.

26. If you came by plane, please give us the name of the company with whom you rode?

A. Northwest Airlines.

27. Where did you board said plane?

A. Seattle, Washington.

28. If you didn't come by plane, please state how you did come and the date of your arrival.

A. ———

29. Do you know who owned the building that you lost your property in by reason of the fire mentioned in your suit?

A. No.

30. What connection, if any, did Haskell Plumb-

ing and Heating Company, Inc., have with relation to the building that was burned?

A. As far as I know, they furnished us the barracks to live in.

31. Did Haskell Plumbing and Heating Company, Inc. own any interest in the building?

A. I do not know.

32. Who furnished you quarters there and what did you pay for the quarters?

A. Haskell Plumbing and Heating Company, and I did not pay anything.

33. What was furnished with the quarters? Did you have any utilities furnished or did you and the other men occupying the quarters pay for the utilities?

A. Board, place to sleep, washing facilities were furnished us. I did not pay anything.

34. What kind of a building was it that was destroyed by fire?

A. Quonset hut.

35. Did you pay Haskell Plumbing and Heating Company, Inc. anything for living in the building?

A. No.

36. Was there a fire department of any kind came to the fire while it was still burning?

A. Not that I know of or saw.

37. If your answer is Yes, please state who was in charge of that fire department.

A. —————

38. Who furnished the oil for the heating of the building you referred to in your Complaint?

A. I do not know.

39. Where was this oil purchased and by whom was it delivered?

A. I do not know.

40. You have alleged the loss of two suitcases. Where did you buy these suitcases, from whom did you buy them, what did you pay for them, how long had you used them?

A. One suitcase was purchased in Adak and one in Seattle. The first was purchased from the **Navy** store at Adak, for which I paid \$30.00, and the other I paid \$45.00 for and bought in Seattle along Third Avenue—I do not recall the name of the store. I had had the suitcases approximately one year and had used them on several trips.

41. You have alleged the loss of a wrist watch. What was the make of this watch? Please give us a full description of it, from whom did you purchase it, when did you purchase it? Please give the address of the person or corporation from whom you purchased it, and please state the amount you paid for it.

A. This was a Gruen 17 or 21-jewel, which I purchased at Peter Michael's Jewellery Store in Seattle, to the best of my recollection. Paid \$75.00. Purchased in 1950. Was in good condition.

42. From whom did you purchase the camera referred to in your Complaint? Was it in working condition at the time of the fire? What is the address of the person from whom you purchased this camera? What did you pay for the camera when you purchased it and on what date did you purchase it?

A. Argo Flex, in good condition. Bought at Navy store at Adak in 1950. Paid \$60.00.

43. You have sued for one Parker Pen set. Please give a full description of it. From whom did you purchase it, and when did you purchase it? Please give the address of the person or corporation from whom you purchased it, and please state the amount you paid for it.

A. This was a pen and pencil set from Loman & Hanford, Seattle, bought in the summer of 1950, for which I paid \$29.00.

44. You have alleged the loss of one suit. Where did you buy this suit, from whom did you buy it, what did you pay for it, how long had you worn it?

A. One blue suit, purchased for \$95.00 from Schmidt the Tailor in Seattle in 1947, I do not recall the exact date. Had worn it numerous times, but it was in perfect condition.

45. You have alleged the loss of one gabardine suit. Where did you buy this suit, from whom did you buy it, what did you pay for it, what color was it, how long had you worn it?

A. This gabardine suit I bought from Klopstein's in Seattle in the summer of 1950 for \$125.00. Brown in color. Worn infrequently.

46. You have alleged the loss of one pair dress slacks. Where did you buy these slacks, from whom did you buy them, what did you pay for them, what color were they, how long had you worn them?

A. I did not allege the loss of one pair of slacks, but in fact alleged the loss of two pairs. These were made by Schmidt the Tailor in Seattle in 1947. Paid

about \$30.00 a pair. One pair was tan and the other was brown. Had worn them off and on for approximately three years.

47. Please state how many dress shirts you had burned in this fire, describe the dress shirts that were burned. Please state the name and address where you purchased said shirts, state the price you paid therefor, and state the length of time you had worn these shirts. Please state the design and color thereof.

A. I lost 4 dress shirts, all white. Do not recall from whom I purchased them, but paid approximately \$4.00 apiece for them in summer of 1950. Do not know the design.

48. Please state how many gabardine shirts you had burned in this fire, describe the gabardine shirts that were burned. Please state the name and address where you purchased said shirts, state the price you paid therefor, and state the length of time you had worn these shirts. Please state the design and color thereof.

A. I lost 2 dress gabardine shirts which I had purchased from Rutherford's in Anchorage in the fall of 1950. Paid \$15.00 apiece. These were in new condition. Colors were brown and green.

49. Please describe the sport jacket that you claim to have lost in the fire. Please give the name and address from whom you purchased this jacket. Please give the price paid therefor. Please give the date or approximate date of the purchase thereof. Please state whether or not it was extensively used prior to the fire.

A. I purchased this sport jacket from Rutherford's in fall of 1950 for \$25.00. I had used it about 6 months.

50. You have sued for one paid of dress shoes. Please describe the dress shoes, state the name and address from whom they were purchased, the approximate date they were purchased. Please state the price you paid therefor. Please state the kind and trade name of said shoes.

A. These were brown dress shoes, French & Shriner brand, purchased from the Northern Commercial Company shortly after Labor day of 1951. Wore them 2 or three days in town and then put them away for future town wear. Paid \$20.00.

51. Please describe the leather toilet case. Where was it purchased, from whom, and what did you pay therefor?

A. I think this was a light brown case. Bought it at Loman & Hanford in Seattle in summer of 1950, and paid \$7.50. It was in good condition.

52. You have alleged the loss of an electric razor. Please state the kind of a razor it was—the name thereof, from whom you purchased it, and what is the address of the place you purchased it? What date did you purchase, what did you pay for this electric razor?

A. This was a Remington electric razor, bought for \$22.00 from Remington store in Seattle in summer of 1950.

53. State the kind and description of the work clothes that you claim were burned, state from whom and the address of whom you purchased



these work clothes, furnishing a list thereof. Please state the price you paid for each article. Please state the length of time you had owned and used these work clothes.

A. These work clothes consisted of overalls, work pants, heavy underwear, socks, work shoes, jackets, work gloves and hats, boots, overshoes, mackinaws, etc., worth at least \$500.00 altogether, and purchased in various places at different times.

54. Please state what negligence the defendant Haskell Plumbing and Heating Company committed by which you claim it liable to respond in damages.

A. Haskell Plumbing and Heating Company furnished us the living quarters and took care of the stoves, and it was their duty to keep the place safe from burning down.

[Printer's Note: The Interrogatories are all signed Bell & Sanders by Bailey E. Bell and filed July 20, 1953. The Answers are signed and verified by the different Plaintiffs and filed April 2, 1954.]

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[Title of District Court and Cause.]

## INTERROGATORIES PROPOUNDED BY DEFENDANT AND ANSWERS THERETO

Comes now the defendant Haskell Plumbing and Heating Company, Inc., a Corporation, acting by and through its attorneys, Bell & Sanders, and pursuant to Rule 33, Federal Rules of Civil Procedure,

submit the following interrogatories to be answered in writing under oath by one of the plaintiffs, Ole Franz, within fifteen days from the date of service hereof.

1. Please state your full name.
  - A. Lyle Wesly "Ole" Franz.
2. Please state your complete present address.
  - A. Box 765, Cheney, Wash.
3. Please state your residence address as of the 17th day of May, 1952.
  - A. c/o E. O. Nay, Whittier, Alaska.
4. For whom were you working on the 11th day of October, 1951?
  - A. Haskell Plumbing & Heating Co.
5. Where were you living on that date?
  - A. King Salmon, Alaska.
6. How many men were living in the same place at that time?
  - A. Eleven.
7. Please give me an exact list of the names and addresses of the men who were living there at that time?
  - A. I don't know.
8. Was there a fire that took place on that date?
  - A. Yes.
9. What were you doing on the 11th day of October, 1951?
  - A. Working.
10. What time of day was it that the fire took place?
  - A. Afternoon.
11. Do you know the name of any men or women

who were in the alleged dormitory immediately preceding the explosion referred to in your Complaint?

A. Do not know.

12. What was the man's name and his address, if any, whose duty it was to take care of the stove or heating unit in said dormitory on the said 11th day of October, 1951?

A. Do not know.

13. Where was said man at that time?

A. Do not know.

14. Do you know anything about the kind of a stove or the type of heating unit that was used?

A. Space heaters.

15. Did you ever have anything to do with the maintenance of said stove or heating unit? If so, state what experience you had along that line.

A. No.

16. Do you know of anyone who saw any explosion in the dormitory on the said 11th day of October, 1951?

A. No.

17. If your answer is Yes, please give us the name and address of the party who saw it.

A. \_\_\_\_\_

18. When did you first learn of the fact that there was a fire in the dormitory building?

A. Approx. 2-3 o'clock.

19. How did you learn about it?

A. Seen the smoke.

20. How soon thereafter did you go to the dormitory?

A. Right away.

21. What did you do after you arrived there?

A. Nothing. It was too late to do anything.

22. What did you say or hear said at that time?

A. I do not recall.

23. How long had you been living in that place?

A. Six weeks.

24. What was the date of your coming to Alaska during the year 1951?

A. April, 1950.

25. How did you come to Alaska?

A. Plane.

26. If you came by plane, please give us the name of the company with whom you rode.

A. I do not recall.

27. Where did you board said plane?

A. Seattle, Wn.

28. If you didn't come by plane, please state how you did come and the date of your arrival.

A. \_\_\_\_\_

29. Do you know who owned the building that you lost property in by reason of the fire mentioned in your suit?

A. No.

30. What connection, if any, did Haskell Plumbing and Heating Company, Inc. have with relation to the building that was burned?

A. It is my belief that Haskell P. & H. Co. had control and had charge of the burned bldg.

31. Did Haskell Plumbing and Heating Company, Inc. own any interest in the building?

A. I do not know.

32. Who furnished you quarters there and what did you pay for the quarters?

A. Haskell Plumbing & Heating Co.

33. What was furnished with the quarters? Did you have any utilities furnished or did you and the other men occupying the quarters pay for the utilities?

A. Everything was furnished at no cost to me.

34. What kind of a building was it that was destroyed by fire?

A. Metal Army type bldg.

35. Did you pay Haskell Plumbing and Heating Company, Inc. anything for living in the building?

A. No.

36. Was there a fire department of any kind came to the fire while it was still burning?

A. I do not recall.

37. If your answer is Yes, please state who was in charge of that fire department.

A. \_\_\_\_\_

38. Who furnished the oil for the heating of the building you referred to in your Complaint?

A. I do not know.

39. Where was this oil purchased and by whom was it delivered?

A. I do not know.

40. From whom did you purchase the binoculars referred to in your Complaint? What kind of binoculars were they? What is the address of the person from whom you purchased the binoculars? What did you pay for the binoculars when you purchased them?

A. Paid \$100.00 for German made binoculars size 10-30. I do not know name or address of person purchased from. It was from a carpenter at Fort Rutheson in 1948.

41. From whom did you purchase the camera referred to in your Complaint? Was it in working condition at the time of the fire? What is the address of the person from whom you purchased this camera? What did you pay for the camera when you purchased it and on what date did you purchase it?

A. Argus C3 in perfect condition. A soldier bought it in King Salmon Army R.X. Cost \$60.00.

42. From whom did you purchase the pistol referred to in your Complaint? What kind of pistol was it? Was it in working condition at the time of the fire? What is the address of the person from whom you purchased this pistol? What did you pay for the pistol when you purchased it and on what date did you purchase it?

A. 22 High Standard New. A1 Fox D & D Bar.

43. You have alleged the loss of an electric razor. Please state the kind of a razor it was—the name thereof, from whom you purchased it, and what is the address of the place you purchased it? What date did you purchase it, what did you pay for this electric razor?

A. Remington bought in Seattle in 1950, \$22.50. Exact date and name of store can be had from Remington Co. headquarters.

44. You have alleged the loss of a 21 jewel wrist watch. What was the make of this watch? Please

give us a full description of it, from whom did you purchase it, when did you purchase it? Please give the address of the person or corporation from whom you purchased it, and please state the amount you paid for it.

A. 21 jewel Bulova and gold band price \$120.00. Pat Elkins, address unknown at present.

45. You have alleged the loss of one suit. Where did you buy this suit, from whom did you buy it, what did you pay of it, what color was it, how long had you worn it?

A. Leonard Custom Tailors. \$96.00. Grey. Worn very little.

46. Please describe the two rings that you claim to have lost in the fire. Please give the name and address from whom you purchased each of the rings. Please give the price paid therefor.

A. Diamond  $\frac{1}{2}$  carat ring—Burts Jewelry, Seattle, Wash. Price \$150.00. Ruby ring—a present. I think valuation was 100 to 200 dollars.

47. You have alleged the loss of a 17 jewel wrist watch. What was the make of this watch? Please give us a full description of it, from whom did you purchase it, when did you purchase it? Please give the address of the person or corporation from whom you purchased it, and please state the amount you paid for it.

A. 17 Illinois. A present. Price \$50.00.

48. You have alleged the loss of one gold nugget tie chain. Please give us a full description of it, from whom you purchased it, the address of the person or corporation from whom you purchased it,

and please state the amount you paid for it.

A. Anchorage Jewelers, Anchorage, Alaska.  
Price \$75.00.

49. You have alleged the loss of a pen and pencil set. Please state the kind of a pen and pencil set it was—the name thereof, from whom you purchased it, and what is the address of the place you purchased it? What did you pay for this pen and pencil set?

A. Three piece Schaeffer set. Price \$30.00. J. Vic Brown Jewelry Store, Anchorage, Alaska.

50. State the kind and description of the work clothes that you claim were burned, state from whom and the address of whom you purchased these work clothes, furnishing a list thereof. Please state the price you paid for each article. Please state the length of time you had owned and used these work clothes.

A. Air Line Company. Weight on my baggage was over 100 pounds. It would be impossible to list each article and where purchased as was two suitcases and foot locker full. Approximate price \$600.

51. Please state what negligence the defendant Haskell Plumbing and Heating Company committed by which you claim it liable to respond in damages.

A. Company used deisel oil instead of stove oil and added gasoline to make it burn better.

[Printer's Note: The Interrogatories are all signed Bell & Sanders by Bailey E. Bell and filed July 20, 1953. The Answers are signed and verified by the different Plaintiffs and filed April 2, 1954.]



[Title of District Court and Cause.]

## INTERROGATORIES PROPOUNDED BY DEFENDANT AND ANSWERS THERETO

Comes now the defendant Haskell Plumbing and Heating Company, Inc., a Corporation, acting by and through its attorneys, Bell & Sanders, and pursuant to Rule 33, Federal Rules of Civil Procedure, submit the following interrogatories to be answered in writing under oath by one of the plaintiffs, Roy Callaway, within fifteen days from the date of service hereof.

1. Please state your full name.

A. Roy Avid Callaway.

2. Please state your complete present address.

A. P. O. Box 786, Anchorage, Alaska.

3. Please state your residence address as of the 17th day of May, 1952.

A. Anchorage, Alaska.

4. For whom were you working on the 11th day of October, 1951?

A. Haskell Plumbing and Heating Company, Inc.

5. Where were you living on that date?

A. King Salmon, Alaska.

6. How many men were living in the same place at that time?

A. Approximately 12 men were living in the dormitory.

7. Please give me an exact list of the names and addresses of the men who were living there at that time.

A. There were living in the dormitory at the same time I was there: Jimmy Weeks, Tommy Judson, Mike Cullinane, Ole Franz, Tom Mulcahy, Ben Holbrook, Jesse Hobbs and W. Van Smith. There were three other men, whose names I do not recall. The only addresses I knew for any of them was King Salmon, Alaska.

8. Was there a fire that took place on that date?

A. Yes.

9. What were you doing on the 11th day of October, 1951?

A. I was installing plumbing equipment in a building approximately one mile from the dormitory.

10. What time of day was it that the fire took place?

A. Approximately 1:15.

11. Do you know the name of any men or women who were in the alleged dormitory immediately preceding the explosion referred to in your Complaint?

A. I was not there and therefore do not know.

12. What was the man's name and his address, if any, whose duty it was to take care of the stove or heating unit in said dormitory on the said 11th day of October, 1951?

A. I do not know.

13. Where was said man at that time?

A. I do not know.

14. Do you know anything about the kind of a stove or the type of heating unit that was used?

A. There were two regular oil heaters.

15. Did you ever have anything to do with the maintenance of said stove or heating unit? If so, state what experience you had along that line.

A. No.

16. Do you know of anyone who saw any explosion in the dormitory on the said 11th day of October, 1951?

A. No.

17. If your answer is Yes, please give us the name and address of the party who saw it.

A. See above.

18. When did you first learn of the fact that there was a fire in the dormitory building?

A. About 1:30 p.m.

19. How did you learn about it?

A. Mr. Mulcahy told me.

20. How soon thereafter did you go to the dormitory?

A. Immediately.

21. What did you do after you arrived there?

A. Stood and watched the fire, which had by this time almost completely destroyed the building.

22. What did you say or hear said at that time?

A. I do not recall.

23. How long had you been living in that place?

A. One month.

24. What was the date of your coming to Alaska during the year 1951?

A. I did not come to Alaska in 1951.

25. How did you come to Alaska?

A. Plane.

26. If you came by plane, please give us the name of the company with whom you rode?

A. Northwestern Airlines.

27. Where did you board said plane?

A. Seattle, Washington.

28. If you didn't come by plane, please state how you did come and the date of your arrival.

A. See above.

29. Do you know who owned the building that you lost your property in by reason of the fire mentioned in your suit?

A. I do not.

30. What connection, if any, did Haskell Plumbing and Heating Company, Inc., have with relation to the building that was burned?

A. I worked for Haskell Plumbing & Heating Company. They provided me with living space in the dormitory and assumed control over the same.

31. Did Haskell Plumbing and Heating Company, Inc. own any interest in the building?

A. I do not know.

32. Who furnished you quarters there and what did you pay for the quarters?

A. Haskell Plumbing & Heating Company, Inc. Quarters were furnished by it over and above wages.

33. What was furnished with the quarters? Did you have any utilities furnished or did you and the other men occupying the quarters pay for the utilities?

A. Board and room, blankets, sheets, bed. Heat was furnished by Haskell Plumbing & Heating Company without charge.

34. What kind of a building was it that was destroyed by fire?

A. Quonset Hut.

35. Did you pay Haskell Plumbing and Heating Company, Inc. anything for living in the building?

A. My hire agreement with Haskell Plumbing & Heating Company provided for living quarters over and above wages.

36. Was there a fire department of any kind came to the fire while it was still burning?

A. I do not recall.

37. If your answer is Yes, please state who was in charge of that fire department.

A. See above.

38. Who furnished the oil for the heating of the building you referred to in your Complaint?

A. I do not know.

39. Where was this oil purchased and by whom was it delivered?

A. See above.

40. You have alleged the loss of one dress suit. Where did you buy this suit, from whom did you buy it, what did you pay for it, what color was it, how long had you worn it?

A. I purchased this suit from a traveling salesman who came to King Salmon and took orders for tailor-made suits. It is my recollection that I paid \$125.00 for the suit, which included the cost of delivery by air mail to me at King Salmon. It was a gray suit, and I had worn it once or twice.

41. You have alleged the loss of one dozen silk shorts. Where did you buy these shorts, from whom

did you buy them, what did you pay for them, what color were they, how long had you worn them?

A. The dozen silk shorts were purchased for me by my wife at my request, and I do not know where she purchased them or what she paid for them, except I have purchased similar shorts at other times and they run approximately \$1.95 per pair. I had had them a few months to my best recollection.

42. You have alleged the loss of one dozen undershirts. Where did you buy these undershirts, from whom did you buy them, what did you pay for them, how long had you worn them?

A. These undershirts were purchased by my wife, and I do not know from whom she purchased them; but I have purchased similar types and they run approximately \$1.50 each. I had had them approximately 3 to 6 months.

43. You have alleged the loss of four sweat shirts. Where did you buy these sweat shirts, from whom did you buy them, what did you pay for them, how long had you worn them?

A. These sweat shirts were purchased by my wife. I do not know from whom, but I have purchased similar sweat shirts for approximately \$2.00.

44. You have alleged the loss of certain wool work clothes, work coats, work shoes, and overhauls. Please state from whom and the address of whom you purchased these work clothes, furnishing a list thereof. Please state the price you paid for each article. Please state the length of time you had owned and used these work clothes.

A. The items referred to in Interrogatory No.

44 represented all of my work clothes, except those clothes I was actually wearing the day of the fire; and they consisted of pants, shirts, shoes, overshoes, sweaters, work coats. I do not know where I purchased these items, but purchased them casually, here and there, when needed. Some were purchased at the commissary, some in Anchorage and elsewhere. They were all in good condition and to replace them would cost approximately \$245.41.

45. Please describe the three wool dress shirts that you claim to have lost in the fire. Please give the name and address from whom you purchased each of the shirts. Please give the price paid therefor. Please give the approximate date of the purchase thereof.

A. These three wool dress shirts were purchased from the traveling salesman who came to the camp. They were tailor-made shirts of the finest quality, and I paid approximately \$35.00 each for them, and had worn them several months, and have placed a value on said shirts of \$53.85.

46. You have alleged the loss of one top coat. Where did you buy this coat, from whom did you buy it, what did you pay for it, what color was it, how long had you worn it?

A. I purchased the coat from the traveling salesman who came to the camp. This was a tailor-made coat, gray in color. I had worn it on only a few occasions and it was practically new. I paid \$85.00 for it.

47. You have alleged the loss of three pair of dress pants. Where did you buy these dress pants,

what did you pay for them, what color were they, how long had you worn them?

A. I do not recall where these dress pants were purchased. They were slacks of the finest quality, purchased in retail stores, either in Anchorage or in Seattle. They cost approximately \$35.00 a pair, and I had worn them on only a few occasions, when I happened to be in town or in the States.

48. You have alleged the loss of one Val-pack. Please give us a full description of it, from whom did you purchase it, when did you purchase it? Please state the amount you paid for it.

A. As near as I can recall I purchased this Val-pack from a PX and paid approximately \$30.00 for the same. I do not remember which PX. It was practically new.

49. You have alleged the loss of certain luggage. Please give a full description, state where and from whom you bought it and what you paid for it.

A. This was a Samsonite suitcase, large size. My wife purchased this item for me as a gift, and to my best recollection she informed me she paid \$34.50. In addition to the suitcase, I had two seabags, canvas material, worth approximately \$5.00 apiece. I had had these bags for two or three years and they were in good condition.

50. You have alleged the loss of two pairs of dress shoes. Please describe the dress shoes, state the name and address from whom they were purchased, the approximate date they were purchased. Please state the price you paid therefor. Please state the kind and trade name of said shoes.



A. These were Florsheim shoes, one pair purchased at I. Bayles in Anchorage and the other pair in Seattle. They cost approximately \$25.00 a pair. I had had one pair approximately a year and the other pair approximately six months.

51. Please describe the two sweaters that you claim to have lost in the fire. Please give the name and address from whom you purchased each of the sweaters. Please give the price paid therefor. Please give the date or approximate date of the purchase thereof. Please state whether or not they were extensively used prior to the fire.

A. These sweaters were pink and white. They were knitted by my wife and were easily worth \$15.00 apiece. I had had them only a few months and had worn them infrequently. These were dress sweaters.

52. You have alleged the loss of one pair of rubbers. Where did you buy these rubbers, from whom did you buy them, what did you pay for them, how long had you worn them?

A. These were heavy galoshes. I do not recall where I purchased them. I had had them approximately one year, and had worn them infrequently. My best recollection is that I paid \$15.00 for them.

53. You have alleged the loss of one toilet kit and toilet articles. Please give a full description of these articles. From whom did you buy them, how much did you pay for them?

A. This was an expensive toilet kit in a genuine leather container made by Rolf, and was a gift from my wife. I do not know where she purchased the

same, except that she paid in excess of \$30.00 for the set. The toilet articles referred to represent scissors, an electric razor worth approximately \$27.50, which was a Remington, a Gillette safety razor worth approximately \$5.00. These were purchased for me by my wife and I do not know from whom. I had had them a year or two. They were all in good, if not new, condition.

54. You have alleged the loss of one wrist watch. What was the make of this watch? Please give us a full description of it, from whom did you purchase it, when did you purchase it? Please give the address of the person or corporation *from you* purchased it, and please state the amount you paid for it.

A. This was a Waltham, 21-jewel wrist watch, and was purchased for me by my wife. I do not know from whom, but it is my best recollection that she paid \$87.50 for the same. I had had it for a few months.

55. You have alleged the loss of one vibrator. Please state the kind of a vibrator it was—the name thereof, from whom you purchased it, and what is the address of the place you purchased it? What date did you purchase it, and what did you pay for it?

A. This was an electric vibrator, purchased at the trading post at King Salmon. I do not know the name. I bought it approximately 1 week before the fire and paid \$17.50 for it.

56. You have alleged the loss of certain dress belts and dress gloves. Please give a full descrip-

tion of these articles. From whom did you buy them, how much did you pay for them?

A. These belts were expensive dress belts worth approximately \$7.50 each. These were probably purchased by my wife, as well as the dress gloves which were purchased by my wife and for which she paid, to my best recollection, \$15.00. I had had the belts approximately a year or two and worn them infrequently, and the gloves I had had approximately a year and worn infrequently.

57. From whom did you purchase the alarm clock referred to in your Complaint? What was the brand name of the clock? What did you pay for it? Was it in working condition at the time of the fire?

A. This was a leather, folding clock, with an alarm attachment, which had been given to me by my wife for use in camp. To my best recollection, the clock cost \$18.00, and I had used it a year or two, and I estimate the present value at \$9.85. It was in good condition.

58. Please state what negligence the defendant Haskell Plumbing and Heating Company committed by which you claim it liable to respond in damages.

A. We were informed at the time of the fire and during the fire that the stove had exploded. I do not know who said so, but that was the general impression that I had and that all the other men had; and that negligence of the Haskell Plumbing & Heating Company caused the stove to explode I cannot say, except that it was its duty to maintain

the heating stove and, if it had been properly maintained, it would not have exploded.

[Printer's Note: The Interrogatories are all signed Bell & Sanders by Bailey E. Bell and filed July 20, 1953. The Answers are signed and verified by the different Plaintiffs and filed April 2, 1954.]

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[Title of District Court and Cause.]

### INTERROGATORIES PROPOUNDED BY DEFENDANT AND ANSWERS THERETO

Comes now the defendant Haskell Plumbing and Heating Company, Inc., a Corporation, acting by and through its attorneys, Bell & Sanders, and pursuant to Rule 33, Federal Rules of Civil Procedure, submit the following interrogatories to be answered in writing under oath by one of the plaintiffs, Tom Mulcahy, within fifteen days from the date of service hereof.

1. Please state your full name.

A. Thomas J. Mulcahy.

2. Please state your complete present address.

A. 329 H. Street, Anchorage, Alaska.

3. Please state your residence address as of the 17th day of May, 1952.

A. Anchorage, Alaska.

4. For whom were you working on the 11th day of October, 1951?

A. Haskell Plumbing & Heating Company, Inc.

5. Where were you living on that date?

A. Haskell Plumbing & Heating Company dormitory at King Salmon, Alaska.

6. How many men were living in the same place at that time?

A. To the best of my belief, 12 men.

7. Please give me an exact list of the names and addresses of the men who were living there at that time.

A. To my best recollection, the men living in the barracks, and the only addresses known to me, were as follows:

Jimmy Weeks—only address known to me was King Salmon, Alaska.

Tommy Judson—only address known to me was King Salmon, Alaska.

Mike Cullinane—only address known to me was King Salmon, Alaska.

Ole Franz—only address known to me was King Salmon, Alaska.

Roy Callaway—only address known to me was King Salmon, Alaska.

Ben Holbrook—only address known to me was King Salmon, Alaska.

Jesse Hobbs—only address known to me was King Salmon, Alaska.

W. Van Smith—only address known to me was King Salmon, Alaska.

Myself, Tom Mulcahy—King Salmon, Alaska.

I do not know the names of the other three men, except that I believe one of them was named Mc-

Laughlin, and the only addresses I know for them was King Salmon, Alaska.

8. Was there a fire that took place on that date?

A. Yes.

9. What were you doing on the 11th day of October, 1951?

A. I was setting fixtures in the A. M. Barracks, located approximately 1 mile from the fire.

10. What time of day was it that the fire took place?

A. Approximately 1:15.

11. Do you know the name of any men or women who were in the alleged dormitory immediately preceding the explosion referred to in your Complaint?

A. I know of no one who was in the dormitory at that time.

12. What was the man's name and his address, if any, whose duty it was to take care of the stove or heating unit in said dormitory on the said 11th day of October, 1951?

A. There was a bull cook, whose name I do not recall, who was responsible for keeping the fire in the heating unit.

13. Where was said man at that time?

A. I have no knowledge of his whereabouts.

14. Do you know anything about the kind of a stove or the type of heating unit that was used?

A. Just an ordinary oil-burning heating unit.

15. Did you ever have anything to do with the maintenance of said stove or heating unit? If so, state what experience you had along that line.

A. No.

16. Do you know of anyone who saw any explosion in the dormitory on the said 11th day of October, 1951?

A. No.

17. If your answer is Yes, please give us the name and address of the party who saw it.

A. See previous answer.

18. When did you first learn of the fact that there was a fire in the dormitory building?

A. Approximately 1:30.

19. How did you learn about it?

A. A cement-finisher, whose name I do not know, came by in a truck and told me the barracks were burning, and to gather up the men and come back to the fire.

20. How soon thereafter did you go to the dormitory?

A. Immediately.

21. What did you do after you arrived there?

A. Upon my arrival, the building was almost disintegrated, and the heat was so great that we could not approach the fire.

22. What did you say or hear said at that time?

A. I said nothing that I recall. I heard talk, but cannot distinguish it at this date.

23. How long had you been living in that place?

A. Approximately two months.

24. What was the date of your coming to Alaska during the year 1951?

A. I came to Alaska in April, 1947.

25. How did you come to Alaska?

A. By boat.

26. If you came by plane, please give us the name of the company with whom you rode?

A. See previous answer.

27. Where did you board said plane?

A. See previous answers.

28. If you didn't come by plane, please state how you did come and the date of your arrival.

A. See previous answers.

29. Do you know who owned the building that you lost your property in by reason of the fire mentioned in your suit?

A. No.

30. What connection, if any, did Haskell Plumbing and Heating Company, Inc., have with relation to the building that was burned?

A. Haskell Plumbing & Heating Company, Inc., furnished the barracks, assigned us to beds therein, and required that I live there.

31. Did Haskell Plumbing and Heating Company, Inc. own any interest in the building?

A. I do not know.

32. Who furnished you quarters there and what did you pay for the quarters?

A. Haskell Plumbing & Heating Company, Inc., furnished the quarters and board as part of our hire agreement.

33. What was furnished with the quarters? Did you have any utilities furnished or did you and the other men occupying the quarters pay for the utilities?



A. Everything was furnished by Haskell Plumbing & Heating Company, Inc.

34. What kind of a building was it that was destroyed by fire?

A. Quonset hut.

35. Did you pay Haskell Plumbing and Heating Company, Inc. anything for living in the building?

A. No.

36. Was there a fire department of any kind came to the fire while it was still burning?

A. Yes.

37. If your answer is Yes, please state who was in charge of that fire department.

A. Fire equipment was in charge of the U. S. Army.

38. Who furnished the oil for the heating of the building you referred to in your Complaint?

A. Haskell Plumbing & Heating Company, Inc., to the best of my knowledge.

39. Where was this oil purchased and by whom was it delivered?

A. I have no knowledge of who delivered the oil or from where it was purchased.

40. You have alleged the loss of one suit case. Please give us a full description of it, from whom did you purchase it, when did you purchase it? Please give the address of the person or corporation from whom you purchased it and state the amount you paid for it.

A. This was a brown, leather-like case, bought in a store near Lane Hotel in Anchorage in July, 1951, and I paid \$22.50 for it.

41. You have alleged the loss of one hand bag. Please give us a full description of it, from whom did you purchase it, when did you purchase it? Please give the address of the person or corporation from whom you purchased it and state the amount you paid for it.

A. Black zipper handbag, purchased at army store on C. Street, Anchorage, in May, 1950. Paid \$10.00 for it.

42. You have alleged the loss of one suit. Where did you buy this suit, from whom did you buy it, what did you pay for it, what color was it, how long had you worn it?

A. This was a blue suit, purchased from Howard Smart, traveling salesman, at King Salmon, for \$135.00, during September, 1951. Worn twice.

43. You have alleged the loss of one overcoat. Where did you buy this overcoat, from whom did you buy it, what did you pay for it, what color was it, how long had you worn it?

A. Black overcoat, purchased at Rutherford's in Anchorage in 1950. Paid \$85.00 for it. Wore it infrequently for two winters.

44. You have alleged the loss of five suits of wool underwear. Where did you buy this underwear, what did you pay for it?

A. This underwear was gray in color and purchased at War Surplus store during summer of 1951. They were new and 9.95 a suit, and had never been worn.

45. You have alleged the loss of five wool work shirts. Please describe each of the shirts, give the

name and address from whom you purchased each and the price thereof. Please give the approximate date of the purchase of each shirt.

A. These wool work shirts were purchased at War Surplus store during summer of 1951, for \$2.50 each. (Used.) O. D. in color.

46. You have alleged the loss of two dress shirts. Please describe each of the shirts, give the name and address from whom you purchased each and the price thereof. Please give the approximate date of the purchase of each shirt.

A. These dress shirts were purchased at Rutherford's for \$5.50 each and were white in color. Bought in 1950, and worn infrequently.

47. You have alleged the loss of a fountain pen. What was the make of this pen? Please give a full description of it, from whom you purchased it, when you purchased it and the price you paid for it.

A. This was a Parker '51 Pen, purchased in 1949 for \$25.00, and used infrequently and was as good as new. Purchased at jewelery store in Anchorage near Rutherford's.

48. You have alleged the loss of a watch. What was the make of this watch? Please give us a full description of it, from whom did you purchase it, when did you purchase it? Please give the address of the person or corporation from whom you purchased it, and please state the amount you paid for it.

A. This was a Bulova wrist watch, purchased for \$42.50 in 1951 at jewelery store near Rutherford's.

49. You have alleged the loss of one Winchester. From whom did you purchase it, what is the address of the place you purchased it. What date did you purchase it, what did you pay for it?

A. This was a 20-gauge shotgun, pump, bought by friend making trip to Anchorage and delivered to me at King Salmon. Cost \$85.00.

50. You have alleged the loss of one pair of hip boots. From whom did you purchase them, what did you pay for them, how long had you used them?

A. These boots were bought at Kennedy Hardware in 1947 for \$12.50. They were used infrequently and were as good as new.

51. You have alleged the loss of one pair leather boots. From whom did you purchase them, what did you pay for them, how long had you used them?

A. These leather boots were bought at I. Bayles in summer of 1951 for \$11.00. Wore them at project, they were still in perfect condition.

52. You have alleged the loss of one Parker. From whom did you purchase it, what is the address of the place you purchased it? What did you pay for it?

A. I bought this parka at Army surplus store, new, for \$27.50. It was never worn.

53. You have sued for one pair of dress shoes. Please describe the dress shoes, state the name and address from whom they were purchased, the approximate date they were purchased. Please state the price you paid therefor. Please state the kind and trade name of said shoes.

A. I bought these dress shoes at Hudson's in the summer of 1950, and wore them infrequently, practically new.

54. You have alleged the loss of a vibrator. Please give us a full description of it, from whom did you purchase it, when did you purchase it? Please give the address of the person or corporation from whom you purchased it, and please state the amount you paid for it.

A. I bought this vibrator at Rexall Drug Store in 1950 for \$15.00, and used it a few times. It was nearly new.

55. You have alleged the loss of a Remington razor. Please state from whom you purchased it, and what is the address of the place you purchased it? What date did you purchase it, what did you pay for this razor?

A. This was a Remington electric razor, bought at Anchorage Radio Appliance in 1950 for \$21.50. Used often, but it was in good condition.

56. Please state what negligence the defendant Haskell Plumbing and Heating Company committed by which you claim it liable to respond in damages.

A. We were furnished living quarters by Haskell Plumbing and Heating Company, with bed, a place to store our personal things, etc.; and it was the defendant's duty to keep said quarters safe; and the barracks burned as the result of an explosion in the heating unit, which heating unit was under the control of the defendant.

[Printer's Note: The Interrogatories are all signed Bell & Sanders by Bailey E. Bell and filed July 20, 1953. The Answers are signed and verified by the different Plaintiffs and filed April 2, 1954.]

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[Title of District Court and Cause.]

### INTERROGATORIES PROPOUNDED BY DEFENDANT AND ANSWERS THERETO

Comes now the defendant Haskell Plumbing and Heating Company, Inc., a Corporation, acting by and through its attorneys, Bell & Sanders, and pursuant to Rule 33, Federal Rules of Civil Procedure, submit the following interrogatories to be answered in writing under oath by one of the plaintiffs, Ben Holbrook, within fifteen days from the date of service hereof.

1. Please state your full name.  
A. Ben Holbrook.
2. Please state your complete present address.  
A. Salyersville, Ky.
3. Please state your residence address as of the 17th day of May, 1952.  
A. Haskell Plumbing and Heating Co., Inc., King Salmon, Alaska.
4. For whom were you working on the 11th day of October, 1951?  
A. Haskell Plumbing and Heating Co.
5. Where were you living on that date?

A. Above Co. Barracks at King Salmon in Alaska.

6. How many men were living in the same place at that time?

A. 9 Steam Fitters and Plbers. and 2 pipe coverers.

7. Please give me an exact list of the names and addresses of the men who were living there at that time.

A. The eight men Plumbers and Pipefitters and 2 pipe coverers. I have forgotten their addresses.

8. Was there a fire that took place on that date.

A. Yes.

9. What were you doing on the 11th day of October, 1951?

A. Working on the job.

10. What time of day was it that the fire took place?

A. Approximately 2 o'clock.

11. Do you know the name of any men or women who were in the alleged dormitory immediately preceding the explosion referred to in your Complaint?

A. No. I do not.

12. What was the man's name and his address, if any, whose duty it was to take care of the stove or heating unit in said dormitory on the said 11th day of October, 1951?

A. I do not know.

13. Where was said man at that time?

A. Do not know.

14. Do you know anything about the kind of a stove or the type of heating unit that was used?

A. Space heater using fuel oil.

15. Did you ever have anything to do with the maintenance of said stove or heating unit? If so, state what experience you had along that line.

A. Not any.

16. Do you know of anyone who saw any explosion in the dormitory on the said 11th day of October, 1951?

A. No.

17. If your answer is Yes, please give us the name and address of the party who saw it.

A. \_\_\_\_\_

18. When did you first learn of the fact that there was a fire in the dormitory building?

A. Approximately 2 o'clock in the afternoon.

19. How did you learn about it?

A. Bull Cook reported it.

20. How soon thereafter did you go to the dormitory?

A. Immediately afterwards.

21. What did you do after you arrived there?

A. It was too late to do anything, the building was destroyed and contents.

22. What did you say or hear said at that time?

A. Not anything that I recall.

23. How long had you been living in that place?

A. Approximately 4½ mos.

24. What was the date of your coming to Alaska during the year 1951?

A. May, 1951.

25. How did you come to Alaska?

A. Automobile.



26. If you came by plane, please give us the name of the company with whom you rode.

A. Answered above.

27. Where did you board said plane?

A. Answered above.

28. If you didn't come by plane, please state how you did come and the date of your arrival.

A. I came by automobile. Arrived in May.

29. Do you know who owned the building that you lost your property in by reason of the fire mentioned in your suit?

A. No.

30. What connection, if any, did Haskell Plumbing and Heating Company, Inc. have with relation to the building that was burned?

A. It is my opinion that Haskell Heating and Plumbing Co. had contract.

31. Did Haskell Plumbing and Heating Company, Inc. own any interest in the building?

A. I do not know.

32. Who furnished you quarters there and what did you pay for the quarters?

A. Haskell Plumbing and Heating. Board and room \$40.25 per week.

33. What was furnished with the quarters? Did you have any utilities furnished or did you and the other men occupying the quarters pay for the utilities?

A. Utilities were all furnished.

34. What kind of a building was it that was destroyed by fire?

A. Quonsin Hut.

35. Did you pay Haskell Plumbing and Heating Company, Inc. anything for living in the building?

A. Yes.

36. Was there a fire department of any kind came to the fire while it was still burning?

A. No.

37. If your answer is Yes, please state who was in charge of that fire department.

A. \_\_\_\_\_

38. Who furnished the oil for the heating of the building you referred to in your Complaint?

A. Not sure; I think Haskell Plumbing and Heating Co.

39. Where was this oil purchased and by whom was it delivered?

A. I do not know.

40. You have alleged the loss of an Argus 35 MM. From whom did you purchase it, and what is the address of the place you purchased it? What did you pay for it?

A. I purchased in Anchorage; do not remember name and address. Cost \$58.00.

41. Please describe the fishing equipment that you claim to have lost in the fire. Please give the name and address from whom you purchased it. Please give the price paid therefor.

A. 3 rods and reels, L. G. Carpenter, Salyersville, Ky.; 3 reels and 1 rod, King Salmon, Alaska; tackle box and accessories, Lexington, Ky. Cost \$300.00.

42. From whom did you purchase the Parker pen set referred to in your Complaint? What is the

address of the person or corporation from whom you purchased the pen set? What did you pay for the pen set?

A. Prater Drug Store, Salyersville, Ky. Price \$22.50.

43. You have alleged the loss of one suit case. Where did you buy this suit case, from whom did you buy it, what did you pay for it, how long had you used it?

A. J. O. Arnett, Salyersville, Ky. \$45.00. 5½ mo.

44. You have alleged the loss of one traveling bag. Where did you buy this bag, from whom did you buy it, what did you pay for it, how long had you used it?

A. I do not remember.

45. You have alleged the loss of a shaving kit. Where did you buy this kit, from whom did you buy it, what did you pay for it. how long had you used it?

A. \$16. Do not remember where I purchased it.

45. You have alleged the loss of an electric razor. Please state the kind of a razor it was—the name thereof, from whom you purchased it, and what is the address of the place you purchased it? What date did you purchase it, what did you pay for this electric razor?

A. Purchased in Anchorage (Remington) \$22.50.

46. You have alleged the loss of one pair Russel Boots. Where did you buy these boots, from whom did you buy them, what did you pay for them, how long had you worn them?

A. Burlin, Wisconsin. Price paid \$37.50. Russell Boot Co.

47. You have alleged the loss of one pair of work boots. Where did you buy these boots, from whom did you buy them, what did you pay for them, how long had you worn them?

A. Anchorage. Price \$18.00.

48. You have alleged the loss of one pair of shoe packs. Where did you buy these shoe packs, what did you pay for them, from whom did you buy them, how long had you used them?

A. Anchorage \$14.00.

49. You have sued for two pair of dress shoes. Please describe the dress shoes, state the name and address from whom they were purchased, the approximate date they were purchased. Please state the price you paid for each pair. Please state the kind and trade name of each pair of shoes.

A. Two pair of Florsheim, \$40.50 for two pair; J. O. Arnett, Salyersville, Ky.

50. You have alleged the loss of two suits of clothes. Where did you buy each suit, from whom did you buy it, what did you pay for each suit, what color was each suit, how long had you worn each suit?

A. Lexington, Ky., \$150.00.

51. Please describe the six dress shirts that you claim to have lost in the fire. Please give the name and address from whom you purchased each of the shirts. Please give the price paid therefor. Please give the approximate date of the purchase thereof.

Please state whether or not they were extensively used prior to the fire.

A. 4 new shirts had not been worn. Purchased in Anchorage. Price \$60.00; 2 purchased in Ky., price \$28.00; 2 slightly used.

52. From whom did you purchase the dress socks you alleged were lost in the fire? When did you purchase them and how much did you pay for each pair?

A. All Argile in all wool; price \$3.50 per pair.

53. Please describe the dress jacket you claim to have lost in the fire. Please the name and address from whom you purchased it and the price paid therefor. Please state the approximate date of the purchase thereof.

A. Suede jacket. Price \$75.00. Purchased at Men Store, Anchorage, Alaska.

54. You have alleged the loss of one top coat. Where did you buy this coat, from whom did you buy it, what did you pay for it, what color was it, how long had you worn it?

A. Hunting, W. Va.; color tweed; price approx. \$78.00.

55. You have alleged the loss of two pairs of slacks. Where did you buy these slacks, from whom did you buy them, what did you pay for each, what color were they, how long had you worn them?

A. Lexington, Ky. Cost \$32.50.

56. You have alleged the loss of certain underwear and winter underwear. Please give the name and address from whom you purchased it, and the

price paid therefor. Please state the approximate date of the purchase thereof.

A. Do not remember; have many suits and cost. Valued it at approx. \$28.00.

57. You have alleged the loss of certain wool stockings, work gloves and other articles of work clothing. Please state the kind and description of each, state from whom and the address of whom you purchased these articles, furnishing a list thereof. Please state the price you paid for each article. Please state the length of time you had owned and used these work clothes.

A. Do not remember where purchased and value.

58. Please describe the dress sweater you claim to have lost in the fire. Where did you buy this sweater, from whom did you buy it, what did you pay for it, how long had you worn it?

A. White sweater purchased in Ky. Value \$10.

59. Please describe the films you allege were lost in fire. Please state where and from whom you bought them and what you paid for them.

A. Color films. Value \$40.00.

60. Please state what negligence the defendant Haskell Plumbing and Heating Company committed by which you claim it liable to respond in damages.

A. No fire watchman and no fire fighting equipment.

[Printer's Note: The Interrogatories are all signed Bell & Sanders by Bailey E. Bell and filed July 20, 1953. The Answers are signed and verified by the different Plaintiffs and filed April 2, 1954.]

[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED BY DEFENDANT AND ANSWERS THERETO

Comes now the defendant Haskell Plumbing and Heating Company, Inc., a Corporation, acting by and through its attorneys, Bell & Sanders, and pursuant to Rule 33, Federal Rules of Civil Procedure, submit the following interrogatories to be answered in writing under oath by one of the plaintiffs, Jesse Hobbs, within fifteen days from the date of service hereof.

1. Please state your full name.

A. My full name is Jesse Abner Hobbs.

2. Please state your complete present address.

A. My complete present address is: 12030 Renton Ave., Seattle 88, Washington.

3. Please state your residence address as of the 17th day of May, 1952.

A. 545 East 12th, Anchorage, Alaska.

4. For whom were you working on the 11th day of October, 1951?

A. Haskell Plumbing and Heating Company, Inc.

5. Where were you living on that date?

A. King Salmon, Alaska, at Barracks provided by Haskell Plumbing and Heating Company, Inc.

6. How many men were living in the same place at that time?

A. Approximately nine or ten.

7. Please give me an exact list of the names and

addresses of the men who were living there at that time.

A. The plaintiffs, above named, were living at King Salmon, Alaska, in said Barracks on the 11th day of October, 1951, but I do not have the present addresses.

8. Was there a fire that took place on that date?

A. Yes.

9. What were you doing on the 11th day of October, 1951?

A. I was working for Haskell Plumbing and Heating Company, Inc. at King Salmon, Alaska, installing plumbing and heating at the Radar Base.

10. What time of day was it that the fire took place?

A. At some time after noon of said date of Oct. 11, 1951. I first saw the fire at approximately 2:00 p.m. of said day.

11. Do you know the name of any men or women who were in the alleged dormitory immediately preceding the explosion referred to in your Complaint?

A. No.

12. What was the man's name and his address, if any, whose duty it was to take care of the stove or heating unit in said dormitory on the said 11th day of October, 1951?

A. I do not know.

13. Where was said man at that time?

A. I do not know.

14. Do you know anything about the kind of a stove or the type of heating unit that was used?



A. I know that there were several oil heaters in the barracks or dormitory but do not know the kind or make.

15. Did you ever have anything to do with the maintenance of said stove or heating unit? If so, state what experience you had along that line.

A. No.

16. Do you know of anyone who saw any explosion in the dormitory on the said 11th day of October, 1951?

A. No.

17. If your answer is Yes, please give us the name and address of the party who saw it.

A. \_\_\_\_\_

18. When did you first learn of the fact that there was a fire in the dormitory building?

A. At approximately 2:00 p.m. of the day of the fire.

19. How did you learn about it?

A. A truck came out to us at the Radar Base and brought us back to the dormitory or barracks.

20. How soon thereafter did you go to the dormitory?

A. At approximately 2:00 p.m.

21. What did you do after you arrived there?

A. Could do nothing as the building was all in flames.

22. What did you say or hear said at that time?

A. Expressions of regret at losing all belongings.

23. How long had you been living in that place?

A. Approximately three weeks.

24. What was the date of your coming to Alaska during the year 1951?

A. April, 1951.

25. How did you come to Alaska?

A. By plane.

26. If you came by plane, please give us the name of the company with whom you rode?

A. Northwest Air Lines.

27. Where did you board said plane?

A. Seattle-Tacoma Airport, Seattle, Wash.

28. If you didn't come by plane, please state how you did come and the date of your arrival.

A. \_\_\_\_\_

29. Do you know who owned the building that you lost your property in by reason of the fire mentioned in your suit?

A. No.

30. What connection, if any, did Haskell Plumbing and Heating Company, Inc., have with relation to the building that was burned?

A. All I know of my own knowledge is that the employees of Haskell Plumbing and Heating Company were housed in said building.

31. Did Haskell Plumbing and Heating Company, Inc. own any interest in the building?

A. I do not know.

32. Who furnished you quarters there and what did you pay for the quarters?

A. Haskell Plumbing and Heating Company furnished the quarters as part of the employment contract.

33. What was furnished with the quarters? Did

you have any utilities furnished or did you and the other men occupying the quarters pay for the utilities?

A. Beds, tables, chairs, hot and cold water, showers and toilets were furnished. Also heat. Nothing was paid for utilities, separately, but the same was required to be furnished under the employment contract.

34. What kind of a building was it that was destroyed by fire?

A. Quonset Hut.

35. Did you pay Haskell Plumbing and Heating Company, Inc. anything for living in the building?

A. Not directly. Such quarters were required to be furnished under the terms of the employment contract.

36. Was there a fire department of any kind came to the fire while it was still burning?

A. Not to my knowledge.

37. If your answer is Yes, please state who was in charge of that fire department.

A. \_\_\_\_\_

38. Who furnished the oil for the heating of the building you referred to in your Complaint?

A. I do not know.

39. Where was this oil purchased and by whom was it delivered?

A. I do not know.

40. You have alleged the loss of one suit case. Where did you buy said suit case, what did you pay for it, how long had you used it?

A. Purchased at Frederick & Nelson, Seattle,

Wash. Paid \$35.00 for same. Purchased in December, 1950.

41. You have alleged the loss of one traveling bag. Where did you buy said bag, from whom did you buy it, what did you pay for it, how long had you used it?

A. Purchased at Frederick & Nelson, Seattle, Wash. Paid \$20.00 for same in December, 1950.

42. You have alleged the loss of one shaving kit. Where did you buy this kit, from whom did you buy it, what did you pay for it, how long had you used it?

A. Purchased at Bon Marche, to best of my knowledge, in Dec. of 1950. I paid \$16.00 for same. Purchased in Seattle, Wash.

43. You have alleged the loss of a Remington Razor. From whom did you purchase it, what is the address of the place you purchased it? What did you pay for this razor and what date did you purchase it?

A. Purchased at Drug Store, Fourth and Seneca, Seattle, Washington, about September, 1950, at a cost of \$22.00.

44. Please describe the slippers you allege were lost in the fire. Where did you buy them, from whom, and what did you pay for them.

A. Purchased at Bon Marche, December, 1950, at a cost of \$7.00.

45. You have sued for three pairs of oxfords. Please describe each of the pairs of oxfords, state the name and address from whom each pair was

purchased, the approximate date they purchased, and the price you paid therefor.

A. Black oxfords purchased at Bon Marche, Seattle, at cost of \$12.00 near Xmas of 1950; one brown pair oxfords purchased at same store at same time at cost of \$12.50; one brown pair oxfords purchased Sept. 1950 at Frederick & Nelson, Seattle, at a cost of \$12.50.

46. You have sued for one pair of work boots. Please state the name and address from whom they were purchased, the approximate date they were purchased, and the price you paid therefor.

A. Purchased at Bon Marche, Seattle, in April, 1951, at a cost of \$18.00.

47. You have sued for the loss of one suit. Where did you buy this suit, from whom did you buy it, what did you pay for it, what color was it, how long had you worn it?

A. Purchased at Frederick & Nelson, Seattle, Wash. in Sept. 1950, at a cost of \$80.00, blue.

48. Please state how many dress shirts you had burned in this fire, describe the dress shirts that were burned. Please state the name and address where you purchased said shirts, state the price you paid therefor, and state the length of time you had worn these shirts. Please state the design and color thereof.

A. Three white dress shirts, purchased at Bon Marche, Seattle, at Xmas time, 1950, at a cost of \$30.00.

49. You have sued for certain dress socks. State the name and address from whom they were pur-

chased, the approximate date they were purchased, the price you paid therefor.

A. Socks purchased at Bon Marche and Frederick & Nelson, Seattle, March, 1951, at a cost of \$15.00.

50. You have alleged the loss of one top coat. Where did you buy this coat, from whom did you buy it, what did you pay for it, what color was it, how long had you worn it?

A. Gray Top Coat purchased at Frederick & Nelson, Seattle, in fall of 1950, at a cost of \$50.00.

51. Please describe the dress gloves you allege were lost in the fire, state where and from whom you purchased them, and the price you paid therefor.

A. Two pairs of dress gloves purchased at Bon Marche, Seattle, November, 1950, at a cost of \$15.00.

52. You have alleged the loss of certain winter and summer underwear. Please state from whom you bought them, the price you paid therefor, and if they had been used extensively before the fire.

A. Six pairs of summer underwear purchased at Bon Marche, Seattle, in April, 1951, at a cost of \$18.00; Three pairs of winter underwear purchased at Bon Marche, Seattle, in April, 1951, at a cost of \$36.00.

53. You have alleged the loss of certain wool and light stockings. Please state where and from whom you purchased them and the price paid therefor.

A. Eight pair of heavy wool stockings purchased at Bon Marche, Seattle, in April, 1951, at a cost of

\$16.00; four pair of light wool stockings, purchased same place and time at cost of \$4.00.

54. You allege the loss of certain work clothes including pants, shirts, etc. State the address and name of the person or corporation from whom you purchased these work clothes. Please state the price you paid for each article. Please state the length of time you had owned and used these work clothes.

A. Four pairs of work pants, heavy wool, purchased at Bon Marche in April, 1951, at a cost of \$28.00; six wool work shirts purchased at Frederick & Nelson and Bon Marche in April, 1951, at a cost of \$50.00.

55. Please describe the dress sweater you allege was lost in the fire. State from whom and the address of the person or place you bought said sweater, the price you paid therefor.

A. Dress sweater purchased at Frederick & Nelson, Seattle, in December, 1950, at a cost of \$12.00.

56. State the name and address of the person or corporation from whom you purchased the Stetson hat you allege was lost in the fire and the price you paid therefor.

A. Stetson hat purchased at Bon Marche, October, 1950, at a cost of \$15.00.

57. Please describe the Alpaca jacket that you claim to have lost in the fire. Give the name and address from whom you purchased the jacket, the price paid therefor. Please state whether or not it was extensively used prior to the fire.

A. Alpaca jacket purchased at Army Surplus, Anchorage, Alaska, Sept. 1951, at a cost of \$24.00.

58. You have alleged the loss of one Parker. Please give a full description of said Parker, stating where and from whom you bought it and the price you paid therefor. State the date you bought it.

A. One Parka purchased at Army Surplus, Anchorage, Alaska, Sept. 1951, at a cost of \$35.00.

59. You have alleged the loss of certain miscellaneous items, including belt, suspenders, cigarette lighter, etc. Please give full descriptions of these items, stating from whom and the address of whom you purchased each, and state the approximate date you purchased each. Please give the price you paid for each item.

A. 1 Ronson cigarette lighter, cost \$10.00, Xmas 1950, Bon Marche, Seattle; 2 pairs suspenders, \$4.00, April, 1951, Bon Marche.

1 belt, Xmas 1950, \$5.00, Bon Marche, Seattle; 1 Rosary, \$4.00 Sept. 1950, Catholic Store, Seattle, Sixth Ave.

60. You have alleged the loss of upper and lower partial plates. Please state from whom and the address of whom you purchased said plates.

A. Dr. Clark, Seattle, Wash., Pike St., 1945, cost of \$150.00.

61. You have alleged the loss of fishing equipment. Please give the name and address of the person or corporation from whom you purchased said equipment, the price you paid for each item and the length of time you had used each item.

A. 2 fly rods and one casting rod at a total cost of \$45.00, Ben Paris, Seattle. Purchased Sept. 1950.



Flies—\$15.00; automatic reel, Ben Paris, Seattle, \$18.00, Sept. 1950. One casting reel—\$12.00, Ben Paris, April, 1951.

62. You have alleged the loss of three pairs of coveralls. Where did you buy these coveralls, from whom did you buy them, what did you pay for them, and how long had you worn them?

A. Three pairs coveralls purchased at J. C. Penneys, Seattle, Wash., April, 1951, cost of \$24.00.

63. Please state what negligence the defendant Haskell Plumbing and Heating Company committed by which you claim it liable to respond in damages.

A. I do not have personal knowledge of negligence.

[Printer's Note: The Interrogatories are all signed Bell & Sanders by Bailey E. Bell and filed July 20, 1953. The Answers are signed and verified by Jesse Abner Hobbs and filed March 9, 1954.]

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[Title of District Court and Cause.]

### MOTION FOR A NEW TRIAL

Comes now the Defendant above named and moves the Honorable Court to grant a new trial in the above entitled cause and for grounds of said motion states:

1. That the Court erred in overruling the Defendant's Motion to Dismiss the Plaintiffs' complaint for the reason that it constituted an improper

joinder of parties plaintiff and an improper joinder of causes of action.

2. That the Court erred in overruling the Motion to Dismiss the Plaintiffs' complaint for the reason that the complaint did not state a cause of action in favor of any of the plaintiffs and against the defendant.

3. That the Court erred in refusing to sustain the defendant's separate motions against each and every one of the plaintiffs separately, for the reasons set forth above, all of which motions were made at the commencement of the trial of the case.

4. The Court erred in overruling the defendant's objections to the introduction of any evidence on behalf of the plaintiff, for all of the reasons set forth in the previous motions.

5. The Court erred in allowing over the objections of the defendant to be introduced in evidence, the interrogatories filed out and answered by the various plaintiffs.

6. The Court erred in overruling the plaintiff's Motion to Dismiss the entire case at the close of the plaintiff's evidence.

7. That the Court erred in overruling the Defendant's Motion to strike all testimony as to each and every plaintiff individually which motion was made at the close of the Plaintiff's testimony.

8. The Court erred in allowing to be introduced in evidence the contract marked Plaintiff's Exhibit

Number 1 for the reason the same was incompetent, irrelevant, immaterial and not properly identified and not within the pleadings and issues involved.

9. The Court erred in denying the Plaintiff's motion to strike Exhibit Number 1 at the close of the Plaintiff's case.

10. The Court erred in denying the defendant's Motions made against each individual plaintiff to dismiss each individual complainant for the further reason that there was no proper proof of the measure of damages offered and no competent evidence introduced as to the value of the property lost.

11. The Court erred at the close of the evidence in denying the defendant's Motion to strike all testimony of the plaintiff.

12. The Court erred at the close of the evidence in overruling the defendant's motion to strike the interrogatories introduced over the objections of the defendant.

13. The Court erred at the close of the case in refusing to sustain the defendant's Motion to Dismiss the separate plaintiff's complaints for the reason that the evidence did not justify a Judgment in favor of any one separately or collectively of the plaintiffs.

14. The Court erred in refusing to strike all evidence of property lost as to each separate individual because there was no competent evidence as to the value of the property lost.

15. The Court erred in denying the defendant's Motion to dismiss made at the close of all of the evidence against each plaintiff separately on the theory that there was no negligence proven as against the defendant.

16. The Court erred in rendering Judgment in favor of the Plaintiffs and each of them wherein he held that the bull-cook or the employees of the Gaaslin Company were the agents of the Defendant Haskell Plumbing Company by reason of the written contract introduced as plaintiff's Exhibit Number 1 and held further that the responsibility to furnish food and lodging could not be delegated to Gaaslin Company and further holding that even though the evidence was, that Haskell Company and its employees did not put this gas in the oil; it being the duty of the Haskell Company to see that these premises were safe; and by finding the defendant liable for this damage.

17. The Court further erred in rendering judgment in favor of the various plaintiffs for the amount sued for after a deduction of 30% of the amount claimed as in many instances there was no competent evidence offered and none received on behalf of the various separate plaintiffs and there being no competent evidence as to the extent of loss and there could be no legal reason to support a judgment in favor of each of the plaintiffs for any sum whatsoever.

The defendant moves this Honorable Court to set

aside the judgment rendered and grant a new trial for all of the reasons above stated.

Dated at Anchorage, Alaska, this 12th day of January, 1955.

BELL & SANDERS,  
/s/ By BAILEY E. BELL,  
Attorney for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed January 13, 1955.

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on for trial before the Court, sitting without a jury on the 5th day of January, 1955. The plaintiffs, Jimmy Weeks, Tommy Judson, Mike Cullinane, Ole Franz, Roy Callaway, Tom Mulcahy, were present together with their attorney, Harold J. Butcher. The plaintiffs, Ben Holbrook and Jesse Hobbs, were not present but were represented by Harold J. Butcher. The defendant was not present in Court but was represented by Bailey E. Bell and trial proceeded thereafter on the 5th, 6th, and 7th, and was concluded on the latter date. Witnesses were sworn and testified and documentary evidence was introduced on behalf of plaintiffs, and thereafter argument was heard and considered; and the Court, having heard the testimony and having considered the

documentary evidence and being fully advised in the premises, rendered its oral opinion on the claims of the several parties and directed that Findings of Fact and Conclusions of Law be prepared and submitted in accordance therewith; and now the Court makes its Findings of Fact and Conclusions of Law as follows:

### Findings of Fact

That counsel for the defendant, on behalf of the defendant, stipulated in open court for purposes of pre-trial Findings of Fact that a fire occurred at King Salmon, Alaska, on October 11, 1951, which fire destroyed the barracks building occupied by the plaintiffs as living quarters.

### First Cause of Action

#### I.

That the plaintiff, Jimmy Weeks, was employed by the Haskell Plumbing and Heating Company, Inc., to perform work at King Salmon, Alaska, in connection with a construction project of the United States Government.

#### II.

That the defendant named above is a corporation organized under the laws of the State of Washington and authorized to do business in the Territory of Alaska, and was at the time of the incident and injury hereinafter alleged, performing plumbing work in connection with a United States Government contract for construction of military facilities at King Salmon, Alaska.

## III.

That under the terms of a written contract of employment the defendant was required to pay the plaintiff a standard wage, and in addition thereto, was required by said written contract to furnish transportation, room and board.

## IV.

That following the commencement of employment under the terms of the written contract of employment, and while the plaintiff was on duty at the work site approximately one mile from the barracks which the defendant had furnished for plaintiff's housing, said barracks was destroyed by fire, resulting from an explosion occurring in a stove located in the barracks building and used for heating said building.

## V.

That said explosion and subsequent fire was caused by the negligence of the defendant in permitting a fuel to be used for heating purposes consisting of a mixture of five gallons of gasoline with each fifty gallons of fuel oil and placed in the fuel barrels from which the fuel was transmitted to the stove.

## VI.

That the foregoing mixture of fuel oil and gasoline reduced the flash point of a regular standard fuel to a degree too dangerous for use as a fuel for heating living quarters for workmen.

## VII.

That this practice of mixing gasoline and fuel

oil was called to the attention of the defendant by the plaintiffs and that the defendant negligently failed to correct the practice and provide a safe fuel for heating said living quarters.

### VIII.

That plaintiff, upon being informed that a fire was destroying the barracks used by plaintiff as living quarters and where he had stored his personal effects and property, went as rapidly as possible to the barracks building, finding upon his arrival that the intensity of the fire was so great that it was impossible to recover any of his personal effects or property.

### IX.

That plaintiff lost personal effects and property in said fire through the negligence of the defendant the following items, valued in the following amounts:

[Printer's Note: List of personal effects are not repeated here as they are a duplicate of those set out at page 5 of this printed record.]

### X.

That the fair value of said property, allowing a depreciation of 30% is in the sum of \$434.35.

## Second Cause of Action

### I.

That the plaintiff, Tommy Judson, was employed by the Haskell Plumbing and Heating Company, Inc., to perform work at King Salmon, Alaska, in



connection with a construction project of the United States Government.

## II.

That the defendant named above is a corporation organized under the laws of the State of Washington and authorized to do business in the Territory of Alaska, and was at the time of the incident and injury hereinafter alleged, performing plumbing **work in connection with a United States Government contract for construction of military facilities at King Salmon, Alaska.**

## III.

That under the terms of a written contract of employment the defendant was required to pay the plaintiff a standard wage, and in addition thereto, was required by said written contract to furnish transportation, room and board.

## IV.

That following the commencement of employment under the terms of the written contract of employment, and while the plaintiff was on duty at the work site approximately one mile from the barracks which the defendant had furnished for plaintiff's housing, said barracks was destroyed by fire, resulting from an explosion occurring in a stove located in the barracks building and used for heating said building.

## V.

That said explosion and subsequent fire was caused by the negligence of the defendant in per-

mitting a fuel to be used for heating purposes consisting of a mixture of five gallons of gasoline with each fifty gallons of fuel oil and placed in the fuel barrels from which the fuel was transmitted to the stove.

#### VI.

That the foregoing mixture of fuel oil and gasoline reduced the flash point of a regular standard fuel to a degree too dangerous for use as a fuel for heating living quarters for workmen.

#### VII.

That this practice of mixing gasoline and fuel oil was called to the attention of the defendant by the plaintiffs and that the defendant negligently failed to correct the practice and provide a safe fuel for heating said living quarters.

#### VIII.

That plaintiff, upon being informed that a fire was destroying the barracks used by plaintiff as living quarters and where he had stored his personal effects and property, went as rapidly as possible to the barracks building, finding upon his arrival that the intensity of the fire was so great that it was impossible to recover any of his personal effects or property.

#### IX.

That plaintiff lost personal effects and property in said fire through the negligence of the defendant the following items, valued in the following amounts:

[Printer's Note: List of personal effects are not repeated here as they are a duplicate of those set out at page 6 of this printed record.]

## X.

That the fair value of said property, allowing a depreciation of 30% is in the sum of \$434.35.

## Third Cause of Action

### I.

That the plaintiff, Mike Cullinane, was employed by the Haskell Plumbing and Heating Company, Inc., to perform work at King Salmon, Alaska, in connection with a construction project of the United States Government.

### II.

That the defendant named above is a corporation organized under the laws of the State of Washington and authorized to do business in the Territory of Alaska, and was at the time of the incident and injury hereinafter alleged, performing plumbing work in connection with a United States Government contract for construction of military facilities at King Salmon, Alaska.

### III.

That under the terms of a written contract of employment the defendant was required to pay the plaintiff a standard wage, and in addition thereto, was required by said written contract to furnish transportation, room and board.

## IV.

That following the commencement of employment under the terms of the written contract of employment, and while the plaintiff was on duty at the work site approximately one mile from the barracks which the defendant had furnished for plaintiff's housing, said barracks was destroyed by fire, resulting from an explosion occurring in a stove located in the barracks building and used for heating said building.

## V.

That said explosion and subsequent fire was caused by the negligence of the defendant in permitting a fuel to be used for heating purposes consisting of a mixture of five gallons of gasoline with each fifty gallons of fuel oil and placed in the fuel barrels from which the fuel was transmitted to the stove.

## VI.

That the foregoing mixture of fuel oil and gasoline reduced the flash point of a regular standard fuel to a degree too dangerous for use as a fuel for heating living quarters for workmen.

## VII.

That this practice of mixing gasoline and fuel oil was called to the attention of the defendant by the plaintiffs and that the defendant negligently failed to correct the practice and provide a safe fuel for heating said living quarters.

## VIII.

That plaintiff, upon being informed that a fire was destroying the barracks used by plaintiff as living quarters and where he had stored his personal effects and property, went as rapidly as possible to the barracks building, finding upon his arrival that the intensity of the fire was so great that it was impossible to recover any of his personal effects or property.

## IX.

That plaintiff lost personal effects and property in said fire through the negligence of the defendant the following items, valued in the following amounts:

[Printer's Note: List of personal effects are not repeated here as they are a duplicate of those set out at page 7 of this printed record.]

## X.

That the fair value of said property, allowing a depreciation of 30% is in the sum of \$783.65.

## Fourth Cause of Action

## I.

That the plaintiff, Ole Franz, was employed by the Haskell Plumbing and Heating Company, Inc., to perform work at King Salmon, Alaska, in connection with a construction project of the United States Government.

## II.

That the defendant named above is a corporation organized under the laws of the State of Washing-

ton and authorized to do business in the Territory of Alaska, and was at the time of the incident and injury hereinafter alleged, performing plumbing work in connection with a United States Government contract for construction of military facilities at King Salmon, Alaska.

### III.

That under the terms of a written contract of employment the defendant was required to pay the plaintiff a standard wage, and in addition thereto, was required by said written contract to furnish transportation, room and board.

### IV.

That following the commencement of employment under the terms of the written contract of employment, and while the plaintiff was on duty at the work site approximately one mile from the barracks which the defendant had furnished for plaintiff's housing, said barracks was destroyed by fire, resulting from an explosion occurring in a stove located in the barracks building and used for heating said building.

### V.

That said explosion and subsequent fire was caused by the negligence of the defendant in permitting a fuel to be used for heating purposes consisting of a mixture of five gallons of gasoline with each fifty gallons of fuel oil and placed in the fuel barrels from which the fuel was transmitted to the stove.

## VI.

That the foregoing mixture of fuel oil and gasoline reduced the flash point of a regular standard fuel to a degree too dangerous for use as a fuel for heating living quarters for workmen.

## VII.

That this practice of mixing gasoline and fuel oil was called to the attention of the defendant by the plaintiffs and that the defendant negligently failed to correct the practice and provide a safe fuel for heating said living quarters.

## VIII.

That plaintiff, upon being informed that a fire was destroying the barracks used by plaintiff as living quarters and where he had stored his personal effects and property, went as rapidly as possible to the barracks building, finding upon his arrival that the intensity of the fire was so great that it was impossible to recover any of his personal effects or property.

## IX.

That plaintiff lost personal effects and property in said fire through the negligence of the defendant the following items, valued in the following amounts:

[Printer's Note: List of personal effects are not repeated here as they are a duplicate of those set out at pages 7-8 of this printed record.]

## X.

That the fair value of said property, allowing a depreciation of 30% is in the sum of \$980.00.

## Fifth Cause of Action

## I.

That the plaintiff, Roy Callaway, was employed by the Haskell Plumbing and Heating Company, Inc., to perform work at King Salmon, Alaska, in connection with a construction project of the United States Government.

## II.

That the defendant named above is a corporation organized under the laws of the State of Washington and authorized to do business in the Territory of Alaska, and was at the time of the incident and injury hereinafter alleged, performing plumbing work in connection with a United States Government contract for construction of military facilities at King Salmon, Alaska.

## III.

That under the terms of a written contract of employment the defendant was required to pay the plaintiff a standard wage, and in addition thereto, was required by said written contract to furnish transportation, room and board.

## IV.

That following the commencement of employment under the terms of the written contract of employment, and while the plaintiff was on duty at the



work site approximately one mile from the barracks which the defendant had furnished for plaintiff's housing, said barracks was destroyed by fire, resulting from an explosion occurring in a stove located in the barracks building and used for heating said building.

#### V.

That said explosion and subsequent fire was caused by the negligence of the defendant in permitting a fuel to be used for heating purposes consisting of a mixture of five gallons of gasoline with each fifty gallons of fuel oil and placed in the fuel barrels from which the fuel was transmitted to the stove.

#### VI.

That the foregoing mixture of fuel oil and gasoline reduced the flash point of a regular standard fuel to a degree too dangerous for use as a fuel for heating living quarters for workmen.

#### VII.

That this practice of mixing gasoline and fuel oil was called to the attention of the defendant by the plaintiffs and that the defendant negligently failed to correct the practice and provide a safe fuel for heating said living quarters.

#### VIII.

That plaintiff, upon being informed that a fire was destroying the barracks used by plaintiff as living quarters and where he had stored his personal effects and property, went as rapidly as possible to

the barracks building, finding upon his arrival that the intensity of the fire was so great that it was impossible to recover any of his personal effects or property.

### IX.

That plaintiff lost personal effects and property in said fire through the negligence of the defendant the following items, valued in the following amounts:

[Printer's Note: List of personal effects are not repeated here as they are a duplicate of those set out at pages 8-9 of this printed record.]

### X.

That the fair value of said property, allowing a depreciation of 30% is in the sum of \$765.46.

## Sixth Cause of Action

### I.

That the plaintiff, Tom Mulcahy, was employed by the Haskell Plumbing and Heating Company, Inc., to perform work at King Salmon, Alaska, in connection with a construction project of the United States Government.

### II.

That the defendant named above is a corporation organized under the laws of the State of Washington and authorized to do business in the Territory of Alaska, and was at the time of the incident and injury hereinafter alleged, performing plumbing work in connection with a United States Govern-

ment contract for construction of military facilities at King Salmon, Alaska.

### III.

That under the terms of a written contract of employment the defendant was required to pay the plaintiff a standard wage, and in addition thereto, was required by said written contract to furnish transportation, room and board.

### IV.

That following the commencement of employment under the terms of the written contract of employment, and while the plaintiff was on duty at the work site approximately one mile from the barracks which the defendant had furnished for plaintiff's housing, said barracks was destroyed by fire, resulting from an explosion occurring in a stove located in the barracks building and used for heating said building.

### V.

That said explosion and subsequent fire was caused by the negligence of the defendant in permitting a fuel to be used for heating purposes consisting of a mixture of five gallons of gasoline with each fifty gallons of fuel oil and placed in the fuel barrels from which the fuel was transmitted to the stove.

### VI.

That the foregoing mixture of fuel oil and gasoline reduced the flash point of a regular standard fuel to a degree too dangerous for use as a fuel for heating living quarters for workmen.

## VII.

That this practice of mixing gasoline and fuel oil was called to the attention of the defendant by the plaintiffs and that the defendant negligently failed to correct the practice and provide a safe fuel for heating said living quarters.

## VIII.

That plaintiff, upon being informed that a fire was destroying the barracks used by plaintiff as living quarters and where he had stored his personal effects and property, went as rapidly as possible to the barracks building, finding upon his arrival that the intensity of the fire was so great that it was impossible to recover any of his personal effects or property.

## IX.

That plaintiff lost personal effects and property in said fire through the negligence of the defendant the following items, valued in the following amounts:

[Printer's Note: List of personal effects are not repeated here as they are a duplicate of those set out at page 10 of this printed record.]

## X.

That the fair value of said property, allowing a depreciation of 30% is in the sum of \$366.10.

## Seventh Cause of Action

## I.

That the plaintiff, Ben Holbrook, was employed by the Haskell Plumbing and Heating Company,

Inc., to perform work at King Salmon, Alaska, in connection with a construction project of the United States Government.

## II.

That the defendant named above is a corporation organized under the laws of the State of Washington and authorized to do business in the Territory of Alaska, and was at the time of the incident and injury hereinafter alleged, performing plumbing work in connection with a United States Government contract for construction of military facilities at King Salmon, Alaska.

## III.

That under the terms of a written contract of employment the defendant was required to pay the plaintiff a standard wage, and in addition thereto, was required by said written contract to furnish transportation, room and board.

## IV.

That following the commencement of employment under the terms of the written contract of employment, and while the plaintiff was on duty at the work site approximately one mile from the barracks which the defendant had furnished for plaintiff's housing, said barracks was destroyed by fire, resulting from an explosion occurring in a stove located in the barracks building and used for heating said building.

## V

That said explosion and subsequent fire was

## IV.

That following the commencement of employment under the terms of the written contract of employment, and while the plaintiff was on duty at the work site approximately one mile from the barracks which the defendant had furnished for plaintiff's housing, said barracks was destroyed by fire, resulting from an explosion occurring in a stove located in the barracks building and used for heating said building.

## V.

That said explosion and subsequent fire was caused by the negligence of the defendant in permitting a fuel to be used for heating purposes consisting of a mixture of five gallons of gasoline with each fifty gallons of fuel oil and placed in the fuel barrels from which the fuel was transmitted to the stove.

## VI.

That the foregoing mixture of fuel oil and gasoline reduced the flash point of a regular standard fuel to a degree too dangerous for use as a fuel for heating living quarters for workmen.

## VII.

That this practice of mixing gasoline and fuel oil was called to the attention of the defendant by the plaintiffs and that the defendant negligently failed to correct the practice and provide a safe fuel for heating said living quarters.

## VIII.

That plaintiff, upon being informed that a fire

was destroying the barracks used by plaintiff as living quarters and where he had stored his personal effects and property, went as rapidly as possible to the barracks building, finding upon his arrival that the intensity of the fire was so great that it was impossible to recover any of his personal effects or property.

### IX.

That plaintiff lost personal effects and property in said fire through the negligence of the defendant the following items, valued in the following amounts:

[Printer's Note: List of personal effects are not repeated here as they are a duplicate of those set out at pages 12-13 of this printed record.]

### X.

That the fair value of said property, allowing a depreciation of 30% is in the sum of \$651.00.

### Ninth Cause of Action

No proof being furnished as to the loss sustained by W. Van Smith, and it appearing to the Court that said W. Van Smith is deceased, said cause of action was dismissed.

And, from the foregoing facts, the Court deduces Conclusions of Law as follows:

### Conclusions of Law

#### I.

That the plaintiff, Jimmy Weeks, is entitled to receive the sum of \$434.35 from the defendant,

Haskell Plumbing and Heating Company, Inc., to reimburse him for the loss of personal property destroyed in the fire at King Salmon, Alaska, October 11, 1951; and this Court will so order.

## II.

That the plaintiff, Tommy Judson, is entitled to receive the sum of \$434.35 from the defendant, Haskell Plumbing and Heating Company, Inc., to reimburse him for the loss of personal property destroyed in the fire at King Salmon, Alaska, October 11, 1951; and this Court will so order.

## III.

That the plaintiff, Mike Cullinane, is entitled to receive the sum of \$783.65 from the defendant, Haskell Plumbing and Heating Company, Inc., to reimburse him for the loss of personal property destroyed in the fire at King Salmon, Alaska, October 11, 1951; and this Court will so order.

## IV.

That the plaintiff, Ole Franz, is entitled to receive the sum of \$980.00 from the defendant, Haskell Plumbing and Heating Company, Inc., to reimburse him for the loss of personal property destroyed in the fire at King Salmon, Alaska, October 11, 1951; and this Court will so order.

## V.

That the plaintiff, Roy Callaway, is entitled to receive the sum of \$765.46 from the defendant,



Haskell Plumbing and Heating Company, Inc., to reimburse him for the loss of personal property destroyed in the fire at King Salmon, Alaska, October 11, 1951; and this Court will so order.

## VI.

That the plaintiff, Tom Mulcahy, is entitled to receive the sum of \$366.10 from the defendant, Haskell Plumbing and Heating Company, Inc., to reimburse him for the loss of personal property destroyed in the fire at King Salmon, Alaska, October 11, 1951; and this Court will so order.

## VII.

That the plaintiff, Ben Holbrook, is entitled to receive the sum of \$754.60 from the defendant, Haskell Plumbing and Heating Company, Inc., to reimburse him for the loss of personal property destroyed in the fire at King Salmon, Alaska, October 11, 1951; and this Court will so order.

## VIII.

That the plaintiff, Jesse Hobbs, is entitled to receive the sum of \$651.00 from the defendant, Haskell Plumbing and Heating Company, Inc., to reimburse him for the loss of personal property destroyed in the fire at King Salmon, Alaska, October 11, 1951; and this Court will so order.

## IX.

The plaintiffs are entitled to recover their taxable costs, and an attorney's fee of \$750.00.

X.

That judgment be entered accordingly at Anchorage, Third Judicial Division, this 19th day of January, 1955.

/s/ WALTER H. HODGE,  
District Judge

Acknowledgment of Service attached.

[Endorsed]: Filed January 19, 1955.

In the District Court for the Territory of Alaska,  
Division Number Three at Anchorage

No. A-7736

JIMMY WEEKS, et al.,                                  Plaintiffs,

vs.

HASKELL PLUMBING AND HEATING COM-  
PANY, INC., Etc., Defendant.

## JUDGMENT

The above entitled cause came on for trial before the Court, sitting without a jury on the 5th day of January, 1955. The plaintiffs, Jimmy Weeks, Tommy Judson, Mike Cullinane, Ole Franz, Roy Callaway, Tom Mulcahy, were present together with their attorney, Harold J. Butcher. The plaintiffs, Ben Holbrook and Jesse Hobbs, were not present but were represented by Harold J. Butcher. The defendant was not present in Court but was represented by Bailey E. Bell and trial proceeded there-

after on the 5th, 6th, and 7th, and was concluded on the latter date. Witnesses were sworn and testified and documentary evidence was introduced on behalf of plaintiffs, and thereafter argument was heard and considered; and the Court, having heard the testimony and having considered the documentary evidence and being fully advised in the premises, rendered its oral opinion on the claims of the several parties; and, having filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith,

It Is Now Ordered, Adjudged and Decreed as follows:

(1) That the plaintiff, Jimmy Weeks, do have and recover from the defendant, Haskell Plumbing and Heating Company, Inc., by reason of this action against said defendant, the sum of \$434.35.

(2) That the plaintiff, Tommy Judson, do have and recover from the defendant, Haskell Plumbing and Heating Company, Inc., by reason of this action against said defendant, the sum of \$434.35.

(3) That the plaintiff, Mike Cullinane, do have and recover from the defendant, Haskell Plumbing and Heating Company, Inc., by reason of this action against said defendant, the sum of \$783.65.

(4) That the plaintiff, Ole Franz, do have and recover from the defendant, Haskell Plumbing and Heating Company, Inc., by reason of this action against said defendant, the sum of \$980.00.

(5) That the plaintiff, Roy Callaway, do have and recover from the defendant, Haskell Plumbing and

Heating Company, Inc., by reason of this action against said defendant, the sum of \$765.46.

(6) That the plaintiff, Tom Mulcahy, do have and recover from the defendant, Haskell Plumbing and Heating Company, Inc., by reason of this action against said defendant, the sum of \$366.10.

(7) That the plaintiff, Ben Holbrook, do have and recover from the defendant, Haskell Plumbing and Heating Company, Inc., by reason of this action against said defendant, the sum of \$754.60.

(8) That the plaintiff, Jesse Hobbs, do have and recover from the defendant, Haskell Plumbing and Heating Company, Inc., by reason of this action against said defendant, the sum of \$651.00.

It Is Further Ordered, Adjudged and Decreed that the plaintiffs have and recover of and from the defendant, Haskell Plumbing and Heating Company, Inc., their costs and disbursements in this action incurred as shown on the cost bill approved by the Clerk of the Court, and an attorney's fee of \$750.00.

Done at Anchorage, Alaska, this 19th day of January, 1955.

/s/ WALTER H. HODGE,  
District Judge

Acknowledgment of Service attached.

[Endorsed]: Filed January 19, 1955.

[Title of District Court and Cause.]

## HEARING ON MOTION FOR NEW TRIAL

Now at this time, this cause coming on to be heard before the Honorable Walter H. Hodge, District Judge, the following proceedings were had, to-wit:

Now at this time Hearing on Motion for New Trial in cause No. A-7736, entitled Jimmy Weeks, Tommy Judson, Mike Cullinane, Ole Franz, Roy Callaway, Tom Mulcahy, Ben Holbrook, Jesse Hobbs and W. Van Smith, plaintiffs, versus Haskell Plumbing and Heating Company, Inc., a Corporation authorized under the Laws of the State of Washington and doing business in the Territory of Alaska, defendant, came on regularly before the Court, plaintiffs not present but represented by Harold J. Butcher, of their counsel, defendant not present, but represented by Bailey E. Bell, of counsel, the following proceedings were had, to-wit:

Argument of the Court was had by Bailey E. Bell, for and in behalf of the defendant,

Whereupon, the Court having heard the argument of Counsel and being fully and duly advised in the premises, Denied motion for new trial.

Entered: January 21, 1955.

[Title of District Court and Cause.]

# NOTICE OF APPEAL

To: Jimmy Weeks, Tommy Judson, Mike Cullinane, Ole Franz, Roy Callaway, Tom Mulcahy, Ben Holbrook, Jesse Hobbs, and their attorney of record, Honorable Harold J. Butcher:

Notice Is Hereby Given, that the Defendant herein, Haskell Plumbing and Heating Company, Inc., a corporation authorized under the laws of the State of Washington and doing business in the Territory of Alaska, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the Order and Judgment granting to Jimmy Weeks, Plaintiff, the sum of \$434.35; to Tommy Judson, Plaintiff, the sum of \$434.35; to Mike Cullinane, Plaintiff, the sum of \$783.65; to Ole Franz, Plaintiff, the sum of \$980.00; to Roy Callaway, Plaintiff, the sum of \$765.46; to Tom Mulcahy, Plaintiff, the sum of \$366.10; to Ben Holbrook, Plaintiff, the sum of \$754.60; and to Jesse Hobbs, Plaintiff, the sum of \$651.00; together with an attorney's fee in the sum of \$750.00, and costs of the action; which judgment was rendered on the 19th day of January, 1955.

Dated at Anchorage, Alaska, this 7th day of February, 1955.

BELL & SANDERS,  
/s/ By BAILEY E. BELL,  
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed February 7, 1955.

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Wm. A. Hilton, Clerk of the above entitled Court do hereby certify that pursuant to the provisions of Rule 10, of the United States Court of Appeals for the Ninth Circuit, as amended, and pursuant to the provisions of Rules 75 (g) (o) of the Federal Rules of Civil Procedure and pursuant to designation of counsel, I am transmitting herewith the original papers in my office dealing with the above entitled action or proceeding, and including specifically the complete record and file of such action, including the Transcript of Record setting forth all the testimony taken at the trial of the cause and all of the exhibits introduced by the respective parties, such record being the complete record of the cause pursuant to the said designation.

The papers herewith transmitted constitute the record on appeal from the judgment filed and entered in the above entitled cause by the above entitled Court on January 19, 1955 to the United States Court of Appeals at San Francisco, California.

[Seal]            /s/ WM. A. HILTON,  
Clerk of the District Court for the Territory of  
Alaska, Third Division.

\* Page numbers appearing at foot of page of original Reporter's Transcript of Record.



(Testimony of William Cruthers.)

identification, the number is Plaintiffs' Exhibit number one.

The Court: You didn't mean the reporter, Mr. Butcher. The clerk.

Mr. Butcher: No, I meant the clerk.

(Mr. Butcher handed the document to the clerk.)

Clerk: For identification?

Mr. Butcher: For identification.

By Attorney for the Plaintiffs:

Q. What is your name?

A. William Cruthers.

Q. How do you spell your name?

A. C-r-u-t-h-e-r-s.

Q. And what is your occupation?

A. Business manager and secretary-treasurer of the Plumbers and Steamfitters Local 367. The United Association.

Q. And as such business manager, and as such secretary, do you have custody of the official papers, documents and records of the Plumbers and Steamfitters Local?      A. I do. [14]

Q. I hand you a document which is marked for identification of Plaintiffs' Exhibit number 1, and ask you to examine it, and after you examined it I will ask you further questions.

(The witness examined a document.)

Q. Do you recognize the document?

A. I do.

Q. Was that document taken from the records and files of the Plumbers Local?      A. It was.

(Testimony of William Cruthers.)

Q. And did you personally remove it from those files?     A. Yes, sir.

Q. And what is it, if you know?

A. It's a contract between the Haskell Plumbing and Heating Company and Local 367.

Q. Will you state on whose behalf that contract was made?

A. On behalf of our local union.

Q. On behalf of your local union?

A. —and their members.

Q. For what people connected with your industry?     A. All of our members.

Q. For all of your members?

A. All of our members.

Q. Were you the business agent and the secretary of the Plumbers Local at the time that contract was made? [15]     A. No, sir.

Q. Who was?     A. Sam Odle.

Q. Sam Odle. That's all.

The Court: Are you offering the contract at this time?

Mr. Butcher: Did you want to cross-examine?

Mr. Bell: No, I do not care to.

Mr. Butcher: I'll call Mr. Sam Odle.

### SAM ODLE

was called as a witness on behalf of the plaintiffs, was duly sworn, and testified as follows:

### Direct Examination

By Attorney for the Plaintiffs

Q. Will you state your full name?

(Testimony of Sam Odle.)

A. Sam Odle. O-d-l-e.

Q. What is your occupation, Mr. Odle?

A. Steamfitter.

Q. And were you formerly connected in some official capacity with the Plumbers and Steamfitters Union?      A. I was.

Q. And what capacity was that?

A. Business manager and secretary-treasurer.

Q. And during what period were you such business manager—agent—and such secretary-treasurer?

A. From June, 1950 until April 2nd, 1954. [16]

Q. I hand you Plaintiffs' Exhibit marked for identification number 1 and ask you if you recognize the document?      A. I do.

Q. And what is it?

A. It is a contract or an agreement between Local 367 and the Haskell Plumbing and Heating Company.

Q. When was that contract made?

A. In August 1950.

Q. And were you a party to that contract as an officer of the Plumbers Local?      A. I was.

Q. And as secretary and business agent?

A. That's right.

Q. And does your signature appear on that document?      A. It certainly does.

Q. Will you examine the last page and state whose signatures do appear thereon?

Mr. Bell: I object to him testifying to reading what's on the instrument. The instrument is the best evidence——

(Testimony of Sam Odle.)

Mr. Butcher: I'm asking him to identify his signature.

Mr. Bell: —only if he knows.

The Court: I think he may identify his signature and state whether it was signed by any others in his presence. [17]

Q. You may proceed, Mr. Odle. Does your signature appear thereon? A. It does.

Q. That is your signature?

A. It is my signature.

Q. Now, is there another signature thereon?

A. Yes, sir.

Q. And whose signature is that?

A. Haskell.

Q. Did he—Mr. Haskell—F. M. Haskell, is that correct? A. F. M. Haskell.

Q. Did he place that signature on that document in your presence? A. He did.

Q. And that constitutes the official agreement between the Haskell Company——

Mr. Bell: I object to his leading and conjecture.

Mr. Butcher: I withdraw the question.

Q. And will you examine each page of that document now and certify whether that is the complete agreement? If it is?

(The witness checked the document.)

A. This is the complete agreement.

Mr. Butcher: I offer this, Your Honor, as Plaintiffs' [18] Exhibit number one and I will show it to counsel.

(Testimony of Sam Odle.)

(Mr. Butcher handed the document to Mr. Bell.)

Mr. Bell: I object to it as incompetent, irrelevant and immaterial, not within the issues in the case, and prejudicial to the defendant here. The contract on its face shows that it is a contract entered into, known as Pipes—Pipe Trades Agreement between the Plumbing, Heating and Piping Employers of Anchorage, Alaska and the Local 367 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and nowhere in the body of the contract is Haskell Plumbing and Heating Company mentioned, and at the base of it it is not executed according to law; it's not signed by the parties; and purports to be signed by—for the employer by F. M. Haskell Plumbing and Heating Incorporated; F. M. Haskell. And then signed for the Union by Sam Odle. But the purpose of the signatures is nowhere shown in the contract, and it is signed and executed by a party who are not parties to the contract in any way to the contents of the contract; and that F. M. Haskell is not a party to this lawsuit, and therefore this would not be binding on him, and the F. M. Haskell Plumbing and Heating Company, Inc. is not a party to this suit.

The Court: May I see it, please?

(The document was handed to the Court.)

The Court: Thanks. (studies the document)

Mr. Bell: Your Honor——

(Testimony of Sam Odle.)

The Court: Just a moment, Counsel. I gave you plenty of time to examine this and I would ask the same privilege.

Mr. Bell: Your Honor, I meant that you might consider at the same time for the further reason that it is not properly identified. That you might consider along with the others so I won't have to state an extra objection.

The Court: This appears to be, as counsel stated, a contract or agreement between an association of employers—contractors and the association of employees being the Union, which I understand is the common practice; that it is signed for the particular employer, The Haskell Plumbing and Heating Co., by F. M. Haskell. I assume that it will be shown that the Haskell Plumbing and Heating Company is a member or party to the Employers Association; that is the Plumbing, Heating and Piping Employers of Anchorage. And subject to that showing the contract may be admitted in evidence as Plaintiffs' Exhibit 1. It is certainly material.

[see pages 426-443.]

Mr. Bell: Exception.

Mr. Butcher: Mr. Odle, I'll return this document to you. Were you acquainted with F. M. Haskell?

A. I am, yes, sir.

Q. When did you first meet Mr. Haskell?

A. In March 1950.

Q. Under what circumstances?

A. Under—— [20]

(Testimony of Sam Odle.)

Mr. Bell: I object to the testimony concerning matters that are not involved in this lawsuit. Now as far as the signature, he's perfectly—he has a perfect right to testify if he knows it's his signature and so on; but going into the controversies of meeting a man who is not a party to the lawsuit. F. M. Haskell is not a party to the lawsuit, nor neither is the F. M. Haskell Plumbing Company a party to the lawsuit.

The Court: Your objection is overruled.

Q. (By Mr. Butcher, continuing): You may answer.

A. In negotiating between contractors and our Local Union 367.

Q. What contractors do you refer to?

A. The Plumbing and Heating contractors.

Q. And when did this negotiation occur?

A. The negotiation started to take place in March of 1950.

Q. And was there present and participating in that negotiation a man who identified himself as F. M. Haskell?

A. He set in the negotiations in Seattle, Washington, in August of that year; but he was here prior to that.

Q. Was he here at any time during any negotiations that you had with the contractors?

A. He was, but he was not on the committee until we got to Seattle. [21]

Q. Until you got to Seattle?           A. Right.

Q. You personally went to Seattle with them?

(Testimony of Sam Odle.)

A. Yes, sir.

Q. And there you met with F. M. Haskell and others in connection with this contract? Is that correct?

A. That's correct.

Q. And did he hold himself out at that time as being the representative of the Haskell Company?

Mr. Bell: I object to that. It's leading and suggestive.

The Court: It is overruled.

Q. —to meet the objection of counsel?

A. He did.

Q. He did. And he participated in those negotiations—

Mr. Bell: I object to it as leading and suggestive.

The Court: Well, it has already been answered; otherwise it would be leading.

Q. —and subsequently in the connection with which he had presented himself, he signed this contract?

Mr. Bell: I object to that as leading and suggestive, as giving the witness the answer.

The Court: The question is leading. You may rephrase it, Counsel.

Q. In what capacity, if you know, did he sign it?

A. As owner of Haskell Plumbing and Heating.

Q. And you in your negotiations accepted him as such?

A. That's right.

The Court: Is that all?

Mr. Butcher: No, I have some further questions with reference to the contract.



(Testimony of Sam Odle.)

Q. Now, Mr. Odle, having made a contract with Haskell Plumbing and Heating, were you called upon on behalf of the Haskell Plumbing and Heating at any time to furnish men under the terms of this contract?      A. I was.

Q. And when were you requested to furnish men?

A. From time to time during the work that was going on in the Territory.

Q. And by whom?

A. By the representative, or by Mr. Haskell himself.

Q. Did Mr. Haskell on some occasions request men from your Local?      A. He did.

Q. Did he do it in person or by writing?

A. In person.

Q. He did it in person. Now, when such a request was made what was your procedure to furnish the men? How did you go about it?

A. We sent them out with dispatch from the Local Office—The Plumbers Union. [23]

Q. Do you have some sort of a form which you use for dispatch purposes?

A. We have a dispatch book with an original and a carbon copy—which we keep the carbon copy.

Q. I hand you a slip of paper and ask you if you can identify it?      A. Yes, sir.

Q. Is that a dispatch slip?

A. That's a dispatch—that's a carbon copy of an original.

Q. Will you examine all of these and tell me if

(Testimony of Sam Odle.)

they are regular, official dispatch slips of the Plumbers and Steamfitters Local? (Hands documents to witness.) A. They are.

The Court: Are they taken, Mr. Odle, from your official records? A. Yes, sir.

Q. I would like to ask that these be marked for identification. I would suggest here, Your Honor, that they be marked for identification as a group—as Plaintiffs' Exhibit number 2, but if Your Honor feels they should be marked separately that could be done.

The Court: I certainly concur with that suggestion, Counsel.

Mr. Butcher: Do you have any objection to marking them as a group? (To Mr. Bell.) [24]

Mr. Bell: No, not to marking them as a group.

Mr. Butcher: —containing one-two-three-four-five-six-seven dispatch slips marked for identification as Plaintiffs' Exhibit number 2.

The Court: The seven dispatch slips may be so marked for identification.

(The documents were marked by the Clerk and then returned to counsel.)

Q. I'll hand you Defendants' Exhibit marked for identification number 2 and ask you to look at each dispatch slip and as you look at it state what kind of dispatch, to whom he was dispatched, and the date.

Mr. Bell: I object to it. The document is the best evidence, and it's not in evidence. Therefore he would not be permitted to read.

(Testimony of Sam Odle.)

Mr. Butcher: I'll withdraw the question.

The Court: That's correct.

Q. Will you examine them now and state whether they are official dispatch slips taken from the records of the Plumbers and Steamfitters Local—official records? A. They are.

The Court: I think he already testified to that. You may answer again. A. Yes, they are.

Q. Will you also examine them and see if your signature [25] appears on either part or all of them?

A. It's on part of them.

Q. On part of them. And now will you refer to those on which your signature doesn't appear?

A. Johny Bennett appears on——

Mr. Bell: I object to that, Your Honor. The instruments speak for themselves.

A. ——three.

The Court: Overruled.

Q. And who was Johny Bennett?

A. He was my assistant at that time.

Q. And were these dispatch slips issued under your supervision and by your direction?

A. It was.

Mr. Butcher: Now, Your Honor, in order to make my offer, I need to—although I agree that the dispatch slips speak for themselves—I must identify the dispatch slip with one of the plaintiffs, so that it will be relevant and material, and I am going to hand them back to this witness and ask him to read the names of those persons that were

(Testimony of Sam Odle.)

patch slip for him?      A. I did.

Q. And what was the result?

A. I never found it.

Q. But do you know of your own knowledge that he was dispatched?      A. I do.

Q. To this job?      A. Yes, sir.

Q. That's all. You may cross-examine.

### Cross-Examination

By Defense Attorney:

Q. Mr. Odle, are you still connected with the Union, now?      A. No.

Q. Are you a journeyman member of it?

A. That's right.

Q. Now, you saw Mr. Haskell, you're sure, F. M. Haskell?      A. I'm sure.

Q. And where did you see him?

A. I seen him in Seattle when the agreement was signed. [29]

Q. Did you ever see him anywhere else?

A. Yes, sir.

Q. Where did you see him other than there?

A. I seen him in Anchorage on different occasions.

Q. About how many times did you see him?

A. Oh, approximately four—five.

Q. What age man would you think he was?

A. I would judge Mr. Haskell to be close to—around sixty.

Q. Was he gray-headed?      A. Yes, sir.

Q. And how big a man is F. M. Haskell?

(Testimony of Sam Odle.)

A. Well, he's over six foot tall and I imagine he'd weigh better than 200.

Q. And was his hair completely gray or did it have some color in it?

A. It had some color in it.

Q. Was it brown or black would you think originally from the way it appeared?

A. Well I'd take it to be originally more or less a little gray—I mean red.

Q. Red. Now you are quite sure that the Mr. Haskell you met had had red hair and was graying, was it not?

A. He was gray.

Q. Well, you're quite sure it had been red? [30]

A. Well it looked dark to me—a little dark, but I don't know, I couldn't tell from the gray.

Q. Well, now do you remember what color eyes he had?

A. No, sir.

Q. Did you ever actually talk to Mr. Haskell, personally? F. M. Haskell, now, I'm talking about?

A. Yes, sir.

Q. And did you ever talk to him here in Anchorage?

A. Yes, sir.

Q. You are positive of it?

A. Yes, sir.

Q. And how many times do you think you talked to him here in Anchorage?

A. I don't remember.

Q. Now, there's another Haskell, is there not?

A. There is. Yes.

Q. Did you ever talk to him?

A. Yes, sir.

Q. Where did you talk to him?

A. In Anchorage.

(Testimony of Sam Odle.)

Q. And what aged man is he?

A. I'd say he was in his thirties.

Q. And was he a red-headed man?

A. He was.

Q. Now and do you know what his name and initials were?

A. I don't recall his initials. [31]

Q. Do you know whether—what relation F. M. Haskell had to the F. M. Haskell Plumbing Company that you say executed this contract? Do you know what his official capacity was?

A. It's known as Haskell Plumbing and Heating Company.

Q. But it's signed F. M. Haskell Plumbing. Now did—was he an officer of the F. M. Haskell Plumbing and Heating Corporation? That you know of?

A. I would say he was the manager.

Q. Now don't say that you would say he was. Tell us what you know about him. What position he had.

A. I know he represented Haskell Plumbing and Heating as their full representative.

Q. Now you don't know whether he was an officer of the corporation or not? A. No.

Q. And you have no—you don't know whether the corporation authorized him to enter into any contract of this kind or not personally, do you?

A. He said they did.

Q. Now answer the question. Do you know whe-

(Testimony of Sam Odle.)

ther or not the corporation had anything to do with it?

Mr. Butcher: Your Honor, I believe he had answered it.

The Court: He has answered the question to the best of any intelligent witness can answer a question, as to whether [32] he knows the corporate authorization. He can only know what is represented. The objection is sustained.

Q. Do you know the Gaasland Construction Company? Do you know those people or are you acquainted with them? A. No, sir.

Q. Did you have any business relations with them in any way? A. No, sir.

Q. Do you know who the general contractor was on the job over at King Salmon?

A. Gaasland Construction Company.

Q. And you didn't make any agreement then with them in any way? A. No, sir.

Q. Were you ever on the job while it was going on, Mr. Odle? A. Yes, sir.

Q. And where was the job being done?

A. In King Salmon.

Q. What kind of a place—what kind of work was being done?

A. Plumbing and steamfitting.

Q. I know. In what kind of a building. What was it being done to or for?

A. For housing for Army personnel. [33]

Q. In other words resident housing?

A. No, sir.

(Testimony of Sam Odle.)

Q. Well, what kind of housing?

A. A barracks.

Q. It was done on barracks there?

A. Right.

Q. And it was done at King Salmon and not Naknek?      A. That's right.

Q. And do you know where the Skytel is there in Naknek?      A. I do.

Q. Which direction was it from the Skytel? That you visited?

A. I don't know.

Q. Can you remember, Mr. Odle, how far it was from the Skytel that this work was going on when you were there?

A. I would say two and a half miles.

Q. And do you remember were any of these employees that are plaintiffs in this case, were any of them working there while you were there?

A. There were.

Q. Now which ones?

A. I don't remember.

Q. You are not sure, but you remember some of them were.

A. I remember part of them.

Q. Well, what time did you visit the place?

A. My last trip was the first part of September '51. [34]

Mr. Butcher: If Your Honor please, I am going to object to any further questions along this line. It is getting beyond the scope and away beyond the



(Testimony of Sam Odle.)

scope of direct examination and if he desires to go into this any further with this witness——

The Court: That is correct, Counsel. It is certainly not proper cross-examination. Objection is sustained.

Q. You were business agent at that time?

A. Yes, sir.

Q. Now, did you ever visit the place these men were living?

A. Yes, sir.

Q. And was it during the time they lived at the Skytel or at the——

Mr. Butcher: I object to any further questions along this line.

The Court: The same ruling.

Mr. Bell: Your Honor, I wish to test the memory of this witness by this form of questions, as he has testified to a lot of positive facts, and I'd like to test his memory on these things, and the only way I can do it is this method, if you will permit me to do it.

The Court: I know of no rule of evidence which will permit you. Your cross-examination is limited to either one or two things, the evidence to which he testified or [35] by way of impeachment. The objection is still sustained.

Mr. Butcher: I have no further questions.

The Court: That will be all, Mr. Odle.

\* \* \* \* \*

ROY CALLAWAY

was then called as a witness in his own behalf, was duly sworn, and testified as follows:

Direct Examination

By Attorney for Plaintiffs:

Q. Will you state your full name to the court?

A. Roy David Callaway. C-a-l-l-a-w-a-y.

Q. Are you the same Roy Callaway that appears as the plaintiff in the lawsuit of Weeks and others against Haskell Plumbing and Heating Company, number A-7736 now before the Court?

A. I am.

Q. What was your last place of occupation, Mr. Callaway? A. Plumber.

Q. How long have you done plumbing? [37]

A. Since 1937.

Q. How long have you been in and around the Anchorage area?

A. Since '47—the spring of '47.

Q. And you are a member of the Plumbers' Local here? A. Yes, sir.

Q. What is the number of that local?

A. 367.

Q. Plumbers' Local 367. A. That's right.

Q. I call your attention to the summer of 1951. Were you employed as a plumber at that time?

A. I was.

Q. Were you operating out of and under the Local 367 at that time? A. Yes, sir.

Q. Were you, at some time during that period, dispatched to Haskell Plumbing and Heating Com-

(Testimony of Roy Callaway.)

pany for work?           A. I was.

Q. Will you explain in your own words how you came to go to work for Haskell Plumbing and Heating Company?

A. I got a call from the business agent——

Mr. Bell: I object to any conferences—conversations between he and the business agent.

Mr. Butcher: He was not asked to testify to those conversations, Your Honor. [38]

The Court: That is correct. Your objection is overruled.

A. I was called by the business agent——

Mr. Butcher: No, don't say what the business agent told you, just state that he called you and who else transpired?

A. He gave me a dispatch to King Salmon, Alaska.

Mr. Butcher: (to clerk): May I have Plaintiffs' Exhibit number 2. (This was given to him.)

Q. Will you examine the part of Plaintiffs' Exhibit number 2 and state whether that is the dispatch slip?

A. Well this is not the original, but it is a copy of it.

Q. It is an exact duplicate of the original?

A. Yes, sir.

Q. Where is the original, if you know?

A. I think it was destroyed by the fire.

Q. When you received the original—what date did you receive the original?

A. October the first, 1951.

(Testimony of Roy Callaway.)

Q. And where did you take that original?

A. I took it to King Salmon, Alaska, and turned it over to the job steward.

Q. Turned it over to the job steward?

A. That's right.

Q. That was your authority was it to go to work? [39]

A. Yes, sir.

Q. Now, while you were still in Anchorage and after you had arranged to take this work by assignment from your Union, how did you get to King Salmon?

A. By plane.

Q. And who furnished the transportation?

A. Haskell Plumbing and Heating.

Q. Were you charged in any way for that transportation?

A. No, sir.

Q. Were you charged in any way for the luggage and baggage you took with you?

A. No, sir.

Q. Did you ever know the cost of transporting you to King Salmon?

A. No, sir.

Q. Upon your arrival in King Salmon, what happened?

A. The job steward met me at the airport and took me over to the camp.

Q. The job steward for who?

A. For Haskell Plumbing and Heating.

Q. Met you at the airport at King Salmon?

A. That's right.

Q. In what manner and by what method did he meet you?

A. Well he just met the plane and took me in

(Testimony of Roy Callaway.)

the truck and hauled me over to the camp where we lived at the barracks. [40]

Q. And when you got to the camp was that the Haskell Plumbing and Heating camp?

A. The barracks that I went to was, yes.

Q. And were you there furnished quarters in the building?      A. I was.

Q. Will you state what building it was; describe the building?

A. It was a large Quonset-hut, and we had bedding and everything was furnished. It had shelves up over the bunks to hang our clothes on. And some of them had oh some kind of cabinets that they built themselves or some one had built to store clothes in.

Q. And you—after entering the barracks you located a spot for your bed and where you were going to store your gear.

A. The job steward had arranged that. He had the sheets, the blankets and everything there for me and had the bunk picked out for me because he knew I was coming.

Q. He assigned you to this particular bunk?

A. Yes, sir.

Q. Now after you had been there—after you had gotten there you went to work on the project. Is that correct?      A. Yes, sir.

Q. And what kind of work were you doing? [41]

A. Plumbing.

Q. And where were you doing this plumbing work?      A. In the Army camp.

(Testimony of Roy Callaway.)

Q. And where was the Army camp as located from your barracks?

A. I would say it was a mile-and-a-half—a mile or a mile-and-a-half from the barracks.

Q. And were you transported out there each day and returned?

A. Each day and returned on company time.

Q. What about your lunch period?

A. At noon—we came in at noon. They brought us in at noon and we'd eat and they took us back after noon.

Q. By "they" who do you mean?

A. Haskell Plumbing and Heating.

Q. I call your attention to a date on or about October 11, did anything unusual happen on that date?      A. Yes, there was a fire.

Q. And where was the fire?

A. In the barracks where we lived.

Q. How did you learn about the fire?

A. My foreman come to the job where I was working and said, "Let's go, boys, I just heard our barracks was on fire. Let's get over there and see if we can salvage anything."

Q. And did you in company with your foreman go over there? [42]      A. I did.

Q. And what did you see when you got there?

A. The barracks was almost totally destroyed.

Q. Was there any possibility of entering the building?      A. None, whatever.

Q. Will you describe the fire, if you can?

A. Well the fire was shooting out of each end of

(Testimony of Roy Callaway.)

the building and out of the roof. And the roof had begun to fall in then.

Q. Now, did you learn what caused the fire?

A. No.

Mr. Bell: Objection. Oh, he's already answered it.

Q. Do you have any idea at all—or did you make any investigation to learn how the fire——

Mr. Bell: Now I object to any idea he might have.

The Court: Well, he corrected that, Counsel. The last question, "Did you make any investigation?"

Mr. Bell: Now that's two questions, then.

The Court: Well, you may answer the last part of the question, Mr. Callaway.

A. (By the witness): Well, there was hardly any way to make an investigation, but the rumor was and——

Mr. Bell: Now I object to rumors.

Mr. Butcher: No rumors. Now, let's go back a step: In addition to the beds you described in the compartments [43] of this building, now was there anything else in the building that was furnished?

A. Yes, there was.

Q. What was it?

A. There was a bathroom and oil stoves for heat.

Q. Oil stoves for heat. And did you have anything to do with these oil stoves? In the way of maintenance or care? A. No, sir.

Q. They were taken care of by someone else?

(Testimony of Roy Callaway.)

A. Someone else, I don't know who.

Q. Who was responsible for furnishing this heat?

Mr. Bell: I object to that statement. If he knows first who is responsible for it.

The Court: Yes. I think that is correct.

A. Haskell Plumbing and Heating.

The Court: That answer will be stricken, Mr. Callaway. You may answer the first—"as to whether you know who was responsible."

Q. Do you know who was responsible for furnishing heat, quarters and—heat and other facilities in these quarters? A. Yes, I do.

Q. Who was that?

A. Haskell Plumbing and Heating.

Q. Was that by virtue of the contract that you had made for you by your Union? [44]

A. It was.

Q. Now, calling your attention to certain properties which you alleged you lost in this fire, will you describe, if you can, first where your property was located in connection with the interior of this building? Can you do that?

A. Most of my clothes, my dress clothes, was hanging up on a rack over my bunk. And part of them was stacked on top of this rack. Part of them was in some seabags I had, and part of them was in my suitcase under the bunk.

Q. In other words, all of the property you had except your clothes on your back which you used in working was in this building? A. It was.



(Testimony of Roy Callaway.)

Q. Now, will you tell the court again what items you lost in that fire and the price—or cost of those items?

A. I can in a roundabout way; it's been some-time——

Mr. Bell: I object to the witness using some papers to testify from.

Mr. Butcher: How do you know he is going to use it?

Mr. Bell: Well, he's got it out in his hand, and I saw him get it out of his pocket, and I suppose he is going to use it.

Q. (By Mr. Butcher): Mr. Callaway, did you make a list of the property that you lost at King Salmon at the request [45] of the Haskell Plumbing and Heating Company? A. I did.

Q. And do you have a copy of that list?

A. I have part of a copy here. This is just the price and the articles that I lost.

Q. Is that an exact copy of the same list that you made at the request of Haskell Plumbing and Heating Company? A. It is.

Q. Will you refer then to that paper and state what you lost and the price?

Mr. Bell: I object to his using the paper unless it is first introduced in evidence, and I've never seen it, I don't know whether it would be admissible or not. It's self-serving, incompetent, irrelevant and immaterial.

The Court: Under the testimony of the witness

(Testimony of Roy Callaway.)

the memorandum or paper may be used by him to refresh his recollection.

Mr. Butcher: You may proceed.

A. (By Mr. Callaway): I lost one dress-suit, price \$125.00.

Q. Where did you get that dress-suit, Mr. Callaway?

A. I ordered it tailor-made from a salesman that come to King Salmon.

Q. What was his name?

A. Howard Smart.

Q. And you paid him cash for it?

A. I did. [46]

Mr. Bell: (interposing) Let him testify——

The Court: Those questions are leading, Counsel.

Mr. Bell: Let him testify. I think he knows what to say.

Mr. Butcher: Well, you are quite right.

Q. (By Mr. Butcher) Is there anything else about the suit you want to say?

A. Nothing, only it was a tailor-made suit. I bought several of them from him before that and since then.

Q. He is a salesman who makes ready-to-measure clothes?     A. That's right.

Q. All right, what else did you lose?

A. I lost a dozen silk shorts. They were nylon shorts but it might be written down silk. But they was nylon shorts.

Q. And what was the price of those shorts?

(Testimony of Roy Callaway.)

A. About around \$2.00 a pair—\$1.95 or \$2.00 a pair.

Q. Did you buy these particular shorts?

A. No, my wife bought them for me.

Q. Have you bought similar shorts?

A. I have.

Q. And that's the price you paid? For that particular kind?      A. That's right.

Q. And were they of the quality that you usually wear?      A. Yes. [47]

Q. Now what else did you lose?

A. I lost a dozen undershirts.

Q. Do you know the price of those undershirts?

A. About a dollar and a half a piece.

Q. And did you buy those yourself?

A. No, sir, my wife bought those for me.

Q. And had you bought others of a similar type?      A. Yes, sir.

Q. And is that the price you usually paid?

A. Just about. Around that.

Q. And these were of the same quality you usually bought?      A. Yes, sir.

Q. Did you lose anything else?

A. I lost four sweatshirts.

Q. Will you describe the approximate cost of those, if you know?

A. About \$2.00 for each.

Q. What else?

A. Two pair of woolen underwear.

Q. And what price were those underwear?

A. About \$7.00 a pair or \$7.50.

(Testimony of Roy Callaway.)

Q. Anything else?

A. Four pair of wool work pants.

Q. At what price?

A. About \$8.00 a pair. Maybe \$9.00. I don't know [48] exactly, but I've priced them since then and I've bought them since then and before that, and it's around \$8.00 a pair.

Q. All right, anything else on your list?

A. Nine wool work shirts.

Q. Will you indicate the quality and type and approximate price of those shirts?

A. Black-Bear. I bought most of them, I think, right here in town, and they run around \$9.50 to \$10.00 each.

Q. Will you indicate whether there was anything else on your list that you lost?

A. Three wool dress shirts—gabardine—wool gabardine—dress shirts—tailor-made.

Q. And what was the price of those?

A. About \$35.00 each. \$35.00 each. They were also tailor-made from this same Howard Smart.

Q. What about the suits, now? Acquired at the same time you bought the suits? A. Yes, sir.

Q. All right, now what else did you lose?

A. I lost a top coat—a tailor-made top coat—wool gabardine. \$85.00 was the price of that.

Q. Did you buy that personally?

A. I bought it from Howard Smart, yes, sir.

Q. All right, what else did you lose? [49]

A. Two wool sweaters, knitted by my wife and you couldn't—I value them at about \$15.00 each.

(Testimony of Roy Callaway.)

Mr. Bell: I object to any testimony about the wool sweaters. They don't seem to be sued for here.

Q. (By Mr. Butcher): Are they mentioned on your list?      A. Yes, sir.

The Court: Yes, if you look at the second page—

Mr. Bell: Oh, it's over on the next page. I didn't see them. All right, go ahead.

The Court: Just a moment. Would you open the window back there, Mr. Johnson? It seems awfully hot.

Q. With reference to the sweaters. Now, your wife made these herself for you, didn't she?

A. Yes, sir.

Q. And you priced them at \$15.00 a piece, considering the work and material that went into them?      A. That's right.

Q. And you believe that's a fair value?

A. I do.

Mr. Bell: Now, I object to leading the witness.

Mr. Butcher: Well, Your Honor, I am not leading him. He has said that that was his valuation.

The Court: Even repetitious questions may sometimes be leading. I would try to avoid that, Counsel.

Q. Now, what's the next item? [50]

A. I had a shaving kit. It was a Ross. Leather shaving kit. My wife bought it for me as a present, and she told me that she paid——

Mr. Bell: I object to what she told him.

A. ——\$30.00 for it.

Mr. Bell: I object to that answer——

Mr. Butcher: Now, just a minute. Don't say

(Testimony of Roy Callaway.)

what your wife told you she paid for it, but if you know what your wife paid for it, you can say so.

The Court: That is correct.

Mr. Bell: I'll go then by what she told him——

A. She paid \$30.00 for it.

Mr. Bell: I move to strike the answer. He hasn't yet qualified to show that——

The Court: It is not responsive, Mr. Callaway. Strictly speaking, you should first state whether you know.

A. All I know, Your Honor, is what she told me she paid for it.

The Court: Well then the answer may be stricken. You may place your own estimate of value on it.

A. Well my estimate is \$31.00.

Q. (By Mr. Butcher): You are acquainted with the type of the material and the quality of the product?

A. Yes, sir.

Q. Have you ever independently priced items of a similar nature? [51]

A. Yes, sir, I have one now just like it.

Q. And what was the price of that?

A. \$31.00.

Mr. Bell: I object to the answer to that because that would not be controlling.

The Court: That would be certainly material. Fixing his own appraisal as to what he pays for the same article now; except for a difference of two years which would not make a great deal of difference.

(Testimony of Roy Callaway.)

A. The toilet articles which was scissors and everything that you use I valued at \$45.00.

Q. All right, what else did you lose in this fire?

A. A Waltham wristwatch—21 jewel—Waltham wristwatch—\$87.00.

Q. And what else did you lose?

A. A vibrator—with several attachments—price \$17.50. I bought it at King Salmon, at the Skytel—at the Post there, myself.

Q. What is the next item?

A. Two work coats.

Q. What type of work coats were they?

A. They was—well, I don't know. Just ordinary—I can't pronounce what kind of material that's inside of them. Those—— [52]

Q. What are they heavy——?

A. Heavy work coats. About \$26.00 a piece. Or \$26.50, something like that.

Q. And what else do you have in your list?

A. Three pair of dress pants—slacks. Valued at \$30.00 each—or around that.

Q. Why do you say around that?

A. Well, that was the price I paid for them.

Q. What else do you have on your list?

A. One valve pack.

Q. What is a valve pack?

A. It's a type of a suitcase. This was leather that you unfold, lay suits in and you can fold it up, and it has pockets on the sides that you can put underclothes and stuff like that. Loose gear in each side of it. Value \$30.00.

(Testimony of Roy Callaway.)

Q. What else do you have on your list?

A. I have one Samsonite large suitcase—\$34.50. That is what I paid for that.

Q. What else do you have?

A. Two seabags—\$5.00 each.

Q. Describe the seabags.

A. A seabag is—it's just a regular GI seabag that stands up, oh, about 3½ foot high, and will hold approximately around 100 lb. of loose clothes.

Q. What else did you have? In the way of personal property?

A. Two dozen wool work socks.

Q. Are you able to put a price on the work socks?

A. \$38.00 for the two dozen.

Q. And what else?

A. One dozen dress socks. \$16.00.

Q. What other items did you have?

A. Two pair of dress shoes—Florsheim. I bought one pair of Bayliss' here in town—and one pair in Seattle. Valued \$25.00 a pair.

Q. Anything else?

A. Two pair of work shoes. The two pair valued \$35.00.

Q. Two pair together valued at \$35.00?

A. Yes.

Q. In other words, you valued them at \$17.50 a piece? A. Yes. That's right.

Q. What else did you lose?

A. Two dress belts—\$7.50 each.

Q. They were leather belts? A. Yes, sir.



(Testimony of Roy Callaway.)

Q. All right, did you have anything else?

A. Three pairs of overalls—total \$17.00—\$17.37.

Q. Were those the type ordinarily worn by plumbers?

A. Yes, sir.

Q. All right, anything else? [54]

A. Two pair of dress gloves. \$15.75.

Q. And any other items?

A. Eight pair of work gloves valued at \$6.00.

Q. Any other items?

A. One alarm clock. Valued \$9.85.

Q. Now, have you totalled the amount of these losses as you have evaluated them?

A. No, I haven't here, but I think it is on one of those sheets, maybe. I don't know.

Q. Now, immediately following this fire, what happened if anything that you can recall?

A. You mean right after the fire—we rushed over and stood and watched it burn.

Q. And did you continue your employment or come back to Anchorage?

A. We came back to Anchorage part of us and one or two of the guys stayed. I came back to Anchorage.

Q. And you didn't return to King Salmon at any time thereafter?

A. No, sir.

Q. Do you know, of your own knowledge, from personal observation what type of heating apparatus was in this building?

A. Yes, there was oil stoves; just ordinarily plain oil stoves. [55]

Q. What fuel was used in them, if you know?

(Testimony of Roy Callaway.)

A. Fuel oil.

Q. Was that fuel oil stored in the building or outside?      A. Outside of the building.

Q. And they were connected up to the heating stove by some mechanical contrivance?

A. Yes, sir. It was tubing—copper tubing—run inside and along the floor to the stove.

Q. And the heat was furnished in that way?

A. Yes, sir.

Mr. Butcher: I think that's all.

The Court: You may cross-examine.

### Cross-Examination

By Defense Attorney:

Q. Where do you live, Mr. Callaway?

A. Now?

Q. No, where did you live then?

A. Well what do you mean by "then"?

Q. Well, at the time you went to work over there?      A. I lived in Anchorage.

Q. Here in Anchorage. Then you have lived here since '47, I believe you stated?

A. Yes, sir.

Q. Do you have a family?      A. Yes, sir.

Q. And they were living in Anchorage while you were over there?

A. Sometimes. Sometimes they was Outside.

Q. When you went over there—what date did you say you went over?

A. October the first, 1951.

Q. When was this fire, then?

(Testimony of Roy Callaway.)

A. The 11th of October, 1951.

Q. What airlines did you go over on?

Q. PNA I think. I am not positive.

Q. Did you take your baggage—luggage along with you went you went over?

A. Yes, sir.

Q. Did you have to pay any excess baggage at that time?           A. No, sir.

Q. What amount of baggage were you allowed to take free?           A. All we had.

Q. And was that all you took, just within the limits of what——?

A. Took everything we had—or I did.

Q. Well, they allowed you to take a certain amount, didn't they—60 lbs. or 48—or something like that.

A. The contractor always paid whatever baggage we had.

Q. But you didn't take enough to make excess baggage, did you? [57]

Mr. Butcher: Well, now, Your Honor, I object to that question, that is, my client will know what he means by "excess baggage."—"taking enough to make excess baggage."

The Court: Well, perhaps he knows what excess baggage means.

Mr. Bell: Do you know what excess baggage means?

A. I didn't in that case, No, because we was never questioned with excess baggage.

Mr. Bell: But you do know what "excess bag-

(Testimony of Roy Callaway.)

gage'' means, don't you? A. Not on bush jobs.

Q. Well, now you know whether—you know the meaning of the words, "excess baggage," don't you? A. Yes.

Q. Well, now then, getting down to it then. Was there anything said about you having excess baggage on going over that day?

Mr. Butcher: He testified that he did have excess baggage.

Mr. Bell: No. Please!

The Court: I think that is proper cross-examination.

A. I don't remember.

Q. Now, if you had taken more than the airline company allowed you to take—each passenger—would that have been called to your attention? [58]

Mr. Butcher: Your Honor, before he answers this question, there has been no evidence here to go into in any way. Now, Mr. Bell said if you had taken more than the airline permitted. If you had taken more. Now, there is no testimony that they had any restrictions of any kind.

The Court: Well now, Counsel, the materiality of it is not for discussion. He was asked concerning the transportation to King Salmon, and therefore cross-examination on that point is permissible.

Mr. Butcher: I agree with you, Your Honor, but he has been asked if there was any restriction placed on it and he said no there wasn't, he took all he wanted to take and there was no charge of any kind.

(Testimony of Roy Callaway.)

The Court: That's the way I understood it, but it counsel wishes to pursue this further, I don't see that he should be limited yet.

Q. (By defense attorney): Do you know about how many pounds of baggage you took with you?

A. I don't remember. No.

Q. How many suit-cases did you take with you?

A. I had a large suit-case; I had a valve-pack and two seabags.

Q. And when you went over, did you intend to spend a year on such matters there, or were you going for a short trip? [59]

A. I went over to complete the job.

Q. And you stayed until it was completed, did you?

A. No. The barracks burned down.

Q. Well, the other men did stay, didn't they, some of them?

A. One or two of them stayed.

Q. Now, do you remember when you left here where you were living at the time you left Anchorage?

A. I was probably living in a hotel. I don't remember what hotel, but my address was the Local, Local 367. We got our mail there.

Q. Well, on October first, 1951, you said you were living in Anchorage, now can't you tell us where you were living at that time?

A. My wife had moved out on the Post, and I was living in town. I don't know what hotel. I don't remember.

(Testimony of Roy Callaway.)

Q. Did the children move out with the wife, too?

A. We didn't have no children.

Mr. Butcher: There has been no such testimony.

Mr. Bell: Oh, I'm sorry. I misunderstood him.

Q. (By defense attorney): Then you can't tell the Court—or can't remember where you were living then when you left here to go to King Salmon?

A. No, sir.

Q. Now, when was it that you made the list that you [60] spoke of in answer to Mr. Butcher's question? When was it you made that list?

A. After I come back to town.

Q. Was that before this suit was filed?

A. Yes.

Q. Did you make a list for Mr. Butcher for the purpose of filing suit?

A. A list was made. We come back to town and a list was made by the orders of our executive board—our organization.

Q. From your Union? A. Yes, sir.

Q. And that's who ordered the list to be made?

A. The reason I would say they ordered it; we come into town, they wanted to know why we left the job. We had to explain why we had no clothes or anything to work with. So they says to make out a list of everything you lost which we had orders from Haskell before we left King Salmon to do that. And I made my list out after I got to town.

Q. Now, when did you buy this dress suit from

(Testimony of Roy Callaway.)

Mr. Smart?           A. The fall of 1950.

Q. And you hadn't worn it, did you?

A. I wore it a few times, one or two times.

Q. While now in going out into the brush, on a brush job did you think it best judgment to take your Sunday suit—your best suit with you? [61]

A. I always do.

Q. You always take that even on brush jobs?

A. Yes, sir.

Q. Now, you had been wearing that then about a year when the fire happened?

A. I had owned it about a year.

Q. You owned it a year. And you paid \$125.00 for it?           A. Yes, sir.

Q. And if you were trying to dispose of it, you couldn't have gotten hardly anything for it—a second-hand suit, could you?

A. The suit was worth just as much to me as a new one would be.

Q. Well, but it wouldn't have brought that on the market, would it?

A. I don't know what it would have brought.

Q. Well, you wouldn't think that it would bring over \$50.00 on the market, would you? A used suit?

Mr. Butcher: Now, Your Honor, he has said that he didn't know what it would bring on the market, and he's asking him now what it would—

The Court: It is still proper cross-examination.

Q. (By defense attorney): You don't know what it would be worth on the market—reasonably worth?

(Testimony of Roy Callaway.)

A. I just know what it would cost me to replace it. [62]

Mr. Butcher: Your Honor, the question is repetitious.

The Court: It has been answered. A certain amount of repetition is permissible in cross-examination—according to my understanding.

Q. (By defense attorney): Now did you wear silk shorts out on this work? A. Yes, sir.

Q. You wore them all the time on the work?

A. I wear them all the time.

Q. And where did you buy those silk shorts?

A. My wife bought them for me.

Q. Where did she buy them?

A. That I don't know.

Q. And you don't know what she paid?

A. No, sir.

Q. Now then, you had a dozen undershirts there, where did you buy those?

A. She bought those for me also.

Q. And you don't know where she bought them?

A. No, sir.

Q. And you don't know what she paid for them?

A. I just know what similar ones cost me, since then.

Q. How long had you had those?

A. I don't remember exactly. But a few months, maybe.

Q. And had you had the silk shorts about the same length of time? [63]

A. The same length of time, yes, about.



(Testimony of Roy Callaway.)

Q. Well, would you say you bought them in the winter or in the spring—or got them about the spring?

A. Well, I'd say it would be in the fall—shortly before I went out to King Salmon.

Q. And you bought a dozen pair at once, did you?

A. She bought them, I didn't.

Q. She bought you a dozen pair at once?

A. Yes, sir.

Q. Now, where did you get these sweat-shirts?

A. She bought those for me, also.

Q. And where did she buy them?

A. I don't know.

Q. And you don't know what she paid for them?

A. I just know what the similar sweat-shirts cost me, since then.

Q. Did you work in those sweat-shirts?

A. Yes, sir.

Q. And had you worked in these that you had there? That burned up?

A. I don't remember. I probably had at one time or the other.

Q. You were wearing some clothes the day the fire happened? [64]

A. Yes, sir.

Q. Now, you had four sweat-shirts that you were carrying with you. Did you have one on at the day of the fire?

A. No, sir.

Q. What did you have on? What were you wearing in the way of clothes that day?

A. I was wearing a pair of low-cut shoes; a pair

(Testimony of Roy Callaway.)

of wool pants; a wool shirt; a pair of overalls; and a GI jacket.

Q. They, of course, were not destroyed by the fire?      A. No, sir.

Q. Now, did you wear wool underwear all the time? Over there?

A. If we was working outside, we did; if we happened to be in a building, why we didn't wear them. If we knew we was going to be in a building that day where it was heat, we didn't wear them. No, because it was too hot to wear them.

Q. Where did you buy this wool underwear?

A. I don't know that—just a minute, maybe I do. I think I bought them right here at the Surplus Store on Fourth Avenue.

Q. Army Surplus?      A. Yes, sir.

Q. And don't you think that \$7.50 for a pair is really more than you would have to pay for that?

A. That's what they cost. [65]

Q. And you don't remember where you bought them, but you know they cost \$7.50?      A. I do.

Q. Did you buy them personally?

A. I bought them.

Q. When did you buy them?

A. Just before I went to King Salmon.

Q. The day before? Do you think?

A. No, maybe not the day before.

Q. Now, how many pair of workpants did you have with you over there on this job?

A. I'll have to check here.

(Testimony of Roy Callaway.)

Q. You're just testifying then to this list that you have in your hand, not from memory?

A. Naturally. It's been over two years ago when I made out the first list, and this was made out—this was a list just like that. So I can't very well remember when a list was made two years ago.

Q. Is that a typewritten list?      A. Yes, it is.

Q. And who made that particular list up for you?

A. Mr. Butcher's secretary at my request.

Q. And that was made out of a copy of the claim in your suit?

A. Out of the original list that I made. [66]

Q. It is the same as set forth in your complaint, is it not? The same thing in your suit?

A. Yes.

Q. Now when did she make that out for you?

A. She made this out last—she made this out yesterday—or today, I don't know, I asked her for it yesterday.

Q. So you don't have any independent recollection of the stuff you lost other than by refreshing your memory from that list?

A. I have certain things here that I can remember, but I can't remember each and every article in the amount that I had.

Q. Now you had nine wool shirts that you paid \$9.50 to \$10.00 a piece for—work shirts—

The Court: May I interrupt a moment, Counsel. The Court is a bit confused here, Mr. Callaway. I understood you to say that you made up this list

(Testimony of Roy Callaway.)

after you came back to town from the job. Now I understand you to say that the list you are testifying from was made only yesterday in Mr. Butcher's office?

Mr. Callaway: Your Honor, I made the original list out of the stuff that I lost when we first came to town and I asked for this list—Mr. Butcher's secretary to make this list for me—of my original list that I had turned over to them so that I would have something to refresh my [67] memory on because I couldn't remember each and every article——

The Court: The original list you made had been turned over to Mr. Butcher's office?

Mr. Callaway: Yes, sir.

The Court: So what you asked them to do was to give you a copy of that original list?

Mr. Callaway: Yes, sir.

The Court: And that's what you have here?

Mr. Callaway: Yes, sir.

The Court: That is clear.

Mr. Bell: Now, Your Honor, I demand that the original list be produced, if he is going to testify——

The Court: Well, he may show a—yes, you should state then what became of the original list. Do you know?

Mr. Callaway: No, sir.

Mr. Butcher: Who did you turn it over to, Mr. Callaway?

Mr. Callaway: I turned it over to my business agent, and he in turn took care of it from there.

(Testimony of Roy Callaway.)

Mr. Bell: Now wait, Mr. Butcher, I'm not done with him yet.

Mr. Butcher: I know you are not done with him and I——

Mr. Bell: And I don't mean to be interrupted when I am cross-examining the witness.

Mr. Butcher: ——but you have now demanded the Court [68] to have this paper disregarded and I have a right to be heard on it.

The Court: Do you wish to question the witness further, first on it?

Mr. Butcher: Yes—No, I want to inform the Court, first. I asked this witness if this was an exact copy of the list that he made at the request of Haskell Plumbing and Heating Company when the fire occurred—immediately after. And he said that it was an exact copy. He is using it only where he needs to refresh his memory, and that is quite proper.

The Court: Yes.

Q. Now, did you see that original list any more after you gave it to the business agent?

A. I don't remember whether I did or not.

Q. Well, did you ever see it in Mr. Butcher's office?

A. I don't think so. Not the original. Maybe I did. I wouldn't say one way or the other.

Q. Did you make that original out in pencil or pen—or typewriter?

A. All of us fellows that come in from King Salmon made the list. It was presented to the girl

(Testimony of Roy Callaway.)

in our office, our secretary, and she typed—retyped it out of lists; typed it out for us.

Q. Did you see it now after she typed it?

A. Yes, sir.

Q. Now where is that list? [69]

A. I don't know.

Q. Well, don't you know anything about the list only the one that Mr. Butcher's secretary gave you yesterday or today?

A. I just merely asked for a copy of the original list that I made out—the prices and the articles that I had lost—that I presented to them.

Q. And you didn't see her make it out?

A. No, sir.

Q. And you don't know whether that is a copy of your original list or not? Only from memory?

A. Naturally that—

Q. And you don't know where the original list is?

A. No, sir.

Mr. Bell: Well, I certainly object to him using this list then—

Mr. Callaway: Mr. Butcher may have it, I don't know.

Mr. Bell: This is all his evidence on this. I move to strike it—for the reason that this is purely a self-serving declaration. A statement made out to testify from yesterday or today, and he doesn't know what become of the original list; he doesn't know whether this is the exact copy of it or not. It couldn't possibly—

The Court: The Court is satisfied from the ques-

(Testimony of Roy Callaway.)

tions asked and answers given by the witness that the copy has been sufficiently shown to be a copy of the original list [70] such that he may use it to refresh his recollection. Not as an exhibit but for that purpose only. And the motion to strike will therefore be denied. It is for that very reason that I asked the question and I think it has been satisfactorily explained.

Mr. Bell: Well, I would ask counsel for plaintiffs to produce the original, then, at this time that I might see it.

Mr. Butcher: If Your Honor please, I don't have it. I have been informed by the business agent that the original list was prepared at the request of the Haskell Plumbing and Heating and was submitted to their insurance company and apparently the insurance company still has it.

The Court: That is your information?

Mr. Butcher: Yes, Your Honor.

The Court: That is, you cannot produce it?

Mr. Butcher: I cannot, sir.

Mr. Bell: I want to renew my motion to strike all the testimony from that document given by examination——

The Court: Well, we have ruled upon that and I see no reason to change the ruling.

Mr. Bell: All right. In other words I just want to save my record on that—that Mr. Butcher has explained it.

The Court: Very well.

Q. (By defense attorney): Now where did you

(Testimony of Roy Callaway.)

get the wool [71] work shirts. Who did you get those from?

A. Well, I bought part of them right here in Anchorage—at the—I can't think of the store—it's on Fourth Avenue—just this side of the—just this side of the Panhandle—that drygoods store right on the corner. I don't remember the name of it.

Q. Well, how many wool work shirts did you have?

(The witness looks at list.)

Mr. Bell: Do you have to examine that list every time to answer every question?

(No response. Witness continues to examine paper which he holds.)

Mr. Bell: Would you please answer the question?

A. Nine. Pardon me, sir, but you mentioned nine and I just didn't know whether I mentioned nine before or not. That's the reason I checked this.

Q. And you didn't remember individually of your own memory at all then?

A. Not over two years, no, sir.

Q. Now you don't know where you got only a part of them, you say?

A. A part of them, I picked them up here and there, but I am sure that they were all Black Bears, because I wear them all the time.

Q. Now how long had you had some of these shirts, for instance? [72]



(Testimony of Roy Callaway.)

A. Some of them several months. Some of them not that long. I don't remember.

Q. Some of the good ones would last a couple of years, wouldn't they? A. Yes.

Q. And you had some of them you think as much as two years? A. Possibly, yes.

Q. And you had some less time than that?

A. Yes, sir.

Q. And you think you gave \$9.50 or \$10.00 a piece for those shirts? A. That's what—yes.

Q. I see. Now and you had some dress shirts—some wool dress shirts—do you have to look at that list every time you answer a question; can't you remember a thing about this stuff?

A. (No response.)

Q. Can't you? Mr. Callaway? Do you have to examine that list to answer each question?

A. (No response.)

Q. Please answer the question.

A. Part of it, yes. I want to look at this list every time I answer one. Is that all right?

Q. Well, why do you have to look at that every time you answer a question? [73]

Mr. Butcher: If Your Honor please, I don't think this witness ought to be badgered by his right to look at a list of personal items which he lost more than two years ago. The Court has ruled that he has a right to look at it and when he does look at it why should he be badgered by Counsel for looking at it?

The Court: I feel that the questioning is rather

(Testimony of Roy Callaway.)

oppressive. I am certain Counsel, I could not remember how much I paid for a shirt two years ago unless I refreshed my recollection somehow. I doubt if Counsel could. I think it is quite proper that a witness be permitted to refresh his recollection from a list made shortly following the fire, and that he should not be oppressed with further questions along that line. He should be protected in that respect.

Mr. Bell: Exception.

Q. (By Mr. Bell): You don't know where you got those dress shirts?

A. Yes, sir, I know where I got them.

Q. Where did you get those?

A. I got them from the salesman, Howard Smart.

Q. And when did you get those?

A. In '50. The fall of '50.

Q. About one year prior to that time?

A. Just about, yes. [74]

Q. And then you had been wearing them occasionally for a year? A. Yes, sir.

Q. Now this top coat, what kind of a coat was that?

A. It was a wool gabardine—tailor-made—same as the shirt.

Q. And who did you get it from?

A. Howard Smart.

Q. And when did you get it?

A. The same time as I got the shirts and the suit.

(Testimony of Roy Callaway.)

Q. A year before?           A. Yes, sir.

Q. And you say you paid \$85.00 for that?

A. Yes, sir.

Q. Don't you think it was worth considerably less one year later?

A. It was worth just as much to me a year later as it was the day I bought it, because I had worn it very little and it was practically new, and I had to replace it.

Q. You didn't have any other top coat?

A. No, sir, not with me.

Q. Well, where did you have any other top coats?

A. The one I had was down in the States.

Q. I see. Now you had some work coats, I believe two work coats, did you not?

A. Yes, sir. [75]

Q. Where did you get those?

A. I don't remember.

Q. Were they Army Surplus?           A. No, sir.

Q. And what kind of coats were they?

A. Oh, they was just ordinary work coats. Some kind of lining inside of them. I don't know whether they was down or what they was. They cost about \$25.00 a piece.

Q. And when did you buy those?

A. I don't remember correctly but within—within two years anyway.

Q. Within two years of the time of the fire.

A. Yes, within two years of the time they were destroyed.

(Testimony of Roy Callaway.)

Q. And you paid \$25.00 a piece for them?

A. Something close to that. I don't remember correctly but it was around \$25.00 or \$26.00. I've priced them since then and that's about what they run.

Q. But you had worn those a couple of years, do you think?

A. Well, I wouldn't say two years. I'd worn them for at least a year, maybe.

Q. I see. Now, you had three dress pants. What kind of pants were those?

A. They were just good gabardine slacks.

Q. Where did you get those?

A. I don't remember that. Just picked them up here and there, I guess. [76]

Q. You can't remember having bought them?

A. No, sir, not the exact place that I bought them.

Q. And how long had you had those?

A. I had them around a year.

Q. Around a year. Now this valve pack, where did you buy that?

A. The valve pack, I'm not positive, but I think I bought it out at Fort Richardson at the PX.

Q. What color was it?

A. It was a kind of a tan—leather—valve pack.

Q. And do they still handle the same kind out there?

A. They probably do at the PX, yes.

Q. And did you buy that yourself?

A. I bought that myself.

(Testimony of Roy Callaway.)

Q. And you think you paid \$30.00—let's see—\$30.00 for that?      A. Yes, sir.

Q. And how old was that?

A. That was less than a year old. It was practically new.

Q. You had used it for traveling or for moving from place to place?      A. Yes.

Q. Now you had some other luggage; what other luggage was it you had? [77]

A. I had a large Samsonite suitcase.

Q. Where did you get that?

A. I don't remember; I probably got it at the PX, too.

Q. And you don't remember getting it there?

A. No, sir.

Q. How long had you had that?

A. I had that about a year.

Q. You bought that yourself?      A. Yes, sir.

Q. But you can't remember whether you bought it around Anchorage or down in the States?

A. I know I got it here in Alaska. I either got it at Whittier or out here at the Post. I might explain why I don't remember these things. My wife had a lot of luggage too, see, so we switched them around. I don't know whether it was one that I bought or whether it was one—or she had the one I bought. I don't remember.

Q. And you can't remember for sure then which one it was that burned, whether it was yours or the one that belonged to your wife?

(Testimony of Roy Callaway.)

A. All I know is they was about the same value—\$35.00 a piece.

Q. It might have been the one that your wife bought and belonged to her?

A. It might have been. [78]

Q. All right. Now there's some other kind of seabags, where did you get those seabags?

A. At the Army Surplus.

Q. Well they're a dollar and a half a piece, aren't they, over there now?

A. No, I paid \$5.00 a piece for these.

Q. Well, were they just ordinary seabags?

A. They was large seabags, yes.

Q. Surplus—property store?

A. Well it was Army Surplus store, yes.

Q. Now you had two dozen wool work socks; where did you buy those?

A. Well I bought part of them here—part of them out on the Post—part of them at Cape Newenham.

Q. Well did you always, when you went out of town on a trip, take two dozen wool socks with you?

A. Yes, because they was no way to get laundry done out there, so you either take a lot of them or wear dirty socks.

Q. Now had you worn those socks any since you'd been there?

A. I'd worn some of them; some of them I'd never had on.

Q. Had you counted those socks at any time?

(Testimony of Roy Callaway.)

A. Yes.

Q. You had?

A. I counted them before I took them out.

Q. You counted them; you know there were exactly two dozen? [79]

A. You are very careful about your underclothes and your socks when you go out on those brush jobs.

Q. Now then you had a dozen dress socks; what kind of socks were they?

A. They were just ordinary dress socks. Oh I don't know, maybe some of them was nylon—rayon—or——

Q. Some rayon?           A. Yes.

Q. You claim here that they was worth \$16.68. Where did you figure out the 68c?

A. Well that I don't know. Maybe my wife got those for me. I think she did get those, I don't remember.

Q. Did your wife help you in making up this list?           A. She certainly did.

Q. Where is she now?           A. She is Outside.

Q. So you can't remember where you bought any of those dress socks?           A. No, sir.

Q. You don't know what condition they were in?

A. I know they were in good condition or I wouldn't have had them.

Q. Now you had two pair of dress shoes. What kind of shoes did you have?           A. Florsheim.

Q. And where did you buy those?

(Testimony of Roy Callaway.)

A. I bought one pair at Bayles here in Anchorage, and one pair in Seattle.

Q. How long had you had them?

A. The pair that I got at Bayles, I had them less than a month; and the ones that I got in Seattle, I had them—I bought them the following fall—about a year before that.

Q. You mean the prior fall? The fall before?

A. Yes, sir.

Q. You had them about a year——

A. Uh-huh.

Q. ——and the other pair you had only had about a month?      A. Yes.

Q. And had you worn them?

A. None at all.

Q. Why did you take them out there with you?

A. I had no place to leave them.

Q. You just took them because you had no place to leave them?

A. That's the reason I took all of this stuff out there with me because I had no where to leave it. If I had left it in town I would have had to pay storage on it. And I had a few things in the cleaners is the only things that I left in town.

Q. You couldn't leave them with your wife at home? [81]

A. My wife and I were separated at that time.

Q. Oh, I'm sorry I mentioned it; I didn't know that. You hadn't mentioned that and I didn't mean to dig into your personal affairs.



(Testimony of Roy Callaway.)

Now, then you had two pair of work shoes—\$35.00. Were they ordinary work shoes?

A. One pair was. I paid \$35.00 for one pair of them, but I had worn them and I valued them at \$35.00.

Q. Where did you buy those?

A. Right at the NC Company here. They're Paul Bunyon Pack. I have two pair of them now. They cost \$37.50 now; but I paid \$35.00 for the pair that I had out there, and I had another pair of work shoes besides those.

Q. And you were using those regularly?

A. I'd used them some, because I didn't wear the same pair of shoes every day.

Q. Oh, of course not. How long had you had those work shoes?

A. Oh, I'd had them less than a year.

Q. Had you worn them pretty steadily?

A. Well, I had worn them some; that's the reason I priced the value at \$35.00, because that's what I paid for the one pair.

Q. Now these two sweaters that you testified about. You say your wife made those for you? [82]

A. Yes, sir.

Q. You didn't have either one of them on that day? A. No, sir.

Q. And they were never priced, or you never obtained an appraisal of them from anyone, did you? Just your own judgment on it?

A. The only thing is that my wife said that the——

(Testimony of Roy Callaway.)

Q. No—no, not what your wife said now——

A. She made them, I had to take her word for it.

Q. Yes. She made the sweaters for you?

A. Yes, sir.

Q. And she bought the wool? A. Yes, sir.

Q. And gave them to you? A. Yes.

Q. And that's all you can tell us about those?

A. That's right.

Q. Now you skipped in your testimony any statement about a pair of rubbers. What do you mean by rubbers? A. A pair of galoshes.

Q. Galoshes. A. Uh-huh.

Q. Well, were they low-tops or high-tops?

A. They was just ordinary high-top galoshes.

Q. And you say they were worth \$15.00? [83]

A. Yes.

Q. And you do know that the regular price is about \$5.00 for galoshes, don't you?

A. No, I don't know that.

Q. Well, were these anything extra or different——? A. They were dress galoshes.

Q. What? A. They were for dress.

Q. Dress? A. Yes.

Q. Something similar to those sitting over there?

A. No.

Q. They weren't. What kind were they?

A. They were smooth, slick rubber.

Q. Smooth, slick rubber——

A. Lined inside.

Q. And you called those dress?

(Testimony of Roy Callaway.)

A. Well, as near dress as you could get a galosh.

Q. Well, you didn't testify about that in going down the list and I wondered why you failed to mention it before. Do you know why you didn't mention it when you were testifying in chief?

A. I don't—maybe I didn't have it on this list or something.

Q. Well, look and see if you do?

A. —or maybe I missed it. (Looks at list.) Yes, here's rubbers I've got here. One pair of rubbers. [84]

Q. What is the price of them there?

A. \$15.00.

Q. Well, have you ever bought any since?

A. No.

Q. Now this toilet kit; who bought that Roth's Toilet Kit for you?      A. My wife.

Q. And where did she buy that?

A. I don't know.

Q. How long have you had that?

A. I hadn't had it very long.

Q. Well men carry those for many, many years, don't they? Sometimes? How long do you think you had yours?

A. Less than a year.

Q. Less than a year.

A. Because it was a birthday present.

Q. And now you had some toilet articles in this; did you?      A. Yes.

Q. What did you have in it?

(Testimony of Roy Callaway.)

A. Oh, I had scissors and safety razors—and whatever you usually have in a——

Q. Scissors and a safety razor?

A. Well a lot of things. I don't remember exactly what——

Q. Can you think of anything else you had in there?

A. I had a razor and whatnot—— [85]

Q. What do you mean by "whatnot"?

A. I can't remember correctly what I had in it——

Q. Was it a Gillette razor?

A. It was a Gillette electric razor.

Q. A Gillette——

A. I mean a Remington electric razor and a Gillette safety razor.

Q. Well you had two razors now instead of one?

A. Yes.

Q. And you had also a pair of scissors?

A. Yes.

Q. Fingernail scissors, did you, something of that kind?

A. I had two pair of scissors.

Q. Oh, you had two pair, not one pair now?

A. I might not have listed everything exactly——

Q. Now where did you buy this wristwatch?

A. I bought this wristwatch at King Salmon.

Q. From whom?           A. At the PX.

Q. Now is there any record over there as to what you paid for it or do you know whether they make a record of the sale of those watches?

(Testimony of Roy Callaway.)

A. I don't know whether they make a record or not, but I know that you can price any watch like it. And I know that is what I paid for it. [86]

Q. Now at the PX you can get those things cheaper than you do on the regular market?

A. You can if some GI buys them for you, but if you go in there and buy it yourself, you don't get it any cheaper.

Q. Did you go in and buy this one?

A. I certainly did.

Q. And how much did you pay for this one?

A. \$87.00.

Q. Then your statement of \$87.50 is wrong then?

A. Well, I didn't bring the cents on any of this. It was \$87.50 I paid but I didn't—just like a lot of things here where there is some odd cents, I didn't mention it before. I didn't think it was necessary.

Q. Now this vibrator, you bought that over there too, didn't you?

A. I bought that at the Skytel Trading Post.

Q. What did you use that for?

A. Well you use it for several things. It had several attachments. You might want to use it on your head or your back or your arms or your legs or anywhere you wanted to use it.

Q. You bought that over there, too?

A. I bought that at the trading post, yes.

Q. And where was that in the building that burned? Where was it kept in the building? [87]

A. The vibrator?

Q. Un-huh.

(Testimony of Roy Callaway.)

A. It was kept in my suitcase.

Q. In your suitcase. Now did you have a wrist-watch on the day that you were working?

A. No, sir.

Q. Did you buy the watch to wear?

A. I didn't pay \$87.00 for a workwatch, no.

Q. And you didn't have a workwatch?

A. No.

Q. Now you bought some dress belts; where did you buy those dress belts?

A. My wife bought those for me.

Q. And were they bought here in town?

A. I don't know where she got 'em.

Q. Are they the same as the belts you have on now?

A. Yes, sir. Identically the same as this one I have on.

Q. And you estimate the value of those as \$7.50 a piece?

A. Yes, sir.

Q. And you don't know where they were bought?

A. No, sir. I know what I paid for this one. It's a genuine kangaroo hide, if you care to examine it.

Q. Well, in this one here, you just refer to them as dress belts?

A. Yes, sir.

Q. And you paid \$7.50 a pair for them, did you?

A. That's what my wife said she paid for them.

Q. You weren't with her when she bought them?

A. No, sir.

Q. And you didn't see the price on them?

(Testimony of Roy Callaway.)

A. I know that is what this one cost and they were just exactly like this one.

Q. Do you know if they were bought here in Anchorage?

A. I don't know where she bought them.

Q. Now this three pair of overalls, how long did you have those?

A. Two paid I'd never had on; and the other pair was worn.

Q. And you think they're worth \$17.37?

A. You just go buy a pair of them.

Q. I don't know, I just wondered.

A. Yes.

Q. They cost that did they?

A. They certainly do.

Q. Now this pair of dress gloves at \$15.75; where were they bought?

A. My wife bought them; that was another present.

Q. You don't know where she bought them?

A. No, sir.

Q. You never bought any of them yourself?

A. I have a pair over there in my coat similar to them. If you would care to look at them. [89]

Q. Where did you buy those?

A. They was also a present.

Q. You do know that you can buy an awfully fine dress glove in Anchorage for \$5.00, didn't you?

A. No, sir.

Q. Haven't you tried?

(Testimony of Roy Callaway.)

A. I have tried but I know you can't buy a pair for \$5.00.

Q. You can't? A. No, sir.

Q. You can buy wool-lined ones for \$6.50, can't you—half of it?

A. Well these is leather gloves; maybe they're not even a dress glove, but I call them a dress glove.

Q. And you don't know how much actually your wife paid for them, but you feel that \$15.00 was approximately right?

A. I have priced gloves similar to them, and the pair that I have now is similar to that glove and that's what they cost.

Q. Where did you buy these?

A. I didn't buy 'em.

Q. Well where did they come from? What store?

A. I don't know where these come from. I said they was a present.

Q. A present this winter?

A. For Christmas. [90]

Q. And you think they would cost \$15.00?

A. Yes, sir.

Q. Where did you get this alarm clock?

A. That was another present from my wife.

Q. Do you know where she got it?

A. She paid eighteen dollars and something for it. I valued it about \$9.85, because I'd had it about a year, but it was just like new.

Q. Was it a winding clock?

A. It was a winding clock, leather-bound, fold-



(Testimony of Roy Callaway.)

ing clock that she bought for me to take on brush jobs with me.

Q. What make clock was it?

A. I don't remember what make it was.

Q. Well, was it a Big Ben.

A. I don't remember.

Q. You don't remember anything about it?

A. I remember it was a leather-bound folding clock.

Q. What date did you go over to King Salmon?

A. October the first, 1951, the last time.

Q. Had you been there working on this job prior to that time?           A. Yes, sir.

Q. Who had you worked for then?

A. Haskell Plumbing and Heating.

Q. Now this building that you have been speaking [91] of— I believe you said it was a Quonset hut, was it?           A. Yes, a large one.

Q. A large one. And it had the stove—the heating equipment were oil stoves and connected to an outside tank; is that right?

A. Outside barrels.

Q. Barrels?           A. Yes, sir.

Q. How many stoves were there in there?

A. Two—in operation. I think there was a third stove there, but I don't remember whether it was hooked up or not. I know at one time that it wasn't.

Q. Did the hook-up on them always look all right to you?

A. Well, to tell you the truth I never did pay much attention to them.

Q. You do know though—you ought to know ex-

(Testimony of Roy Callaway.)

actly how they ought to be done, being a plumber, don't you?      A. Yes, sir.

Q. And did you notice anything about these that indicated they weren't properly hooked up?

A. I never had any occasion to pay any attention to them, because I never worked on them.

Q. And you didn't have anything to do with keeping them operated?      A. No, sir. [92]

Q. Now, didn't you have a—someone who came to the barracks each day and cleaned it up? Wasn't there a service such as that there?

A. I don't know.

Q. Well, did you make up your own bed?

A. Did I make up my own bed?

Q. Uh-huh.      A. No, sir.

Q. Well, somebody changed the sheets and linens there for you, did they not?      A. Yes, sir.

Q. Now, do you know who that was?

A. No, sir, all I know is he was a bull-cook.

Q. And the bull-cook worked up at the boarding place—or where you ate, did he?

A. I don't even know where he worked.

Q. He was just a bull-cook, then?

A. That's right.

Q. Could you remember his name if I said it to you?      A. No, sir.

Q. Now where did you eat, Mr. Callaway?

A. We ate in the messhall.

Q. And where was the messhall from this building that was furnished there, would you say?

(Testimony of Roy Callaway.)

A. Oh, I would say it was a hundred or a hundred and fifty yards away from the building. [93]

Q. And did you eat there just with employees of the Haskell Plumbing and Heating Company or were there other people eating there?

A. There was other people ate there.

Q. Now, who were the other people working for that ate there with you?

A. I don't know, they was just construction——

Q. Working—— A. On the job, yes.

Q. There was more work going on other than the plumbing, of course? A. Yes, sir.

Q. Now was the building itself being constructed and carpenters working at the time you were working there? A. What building?

Q. Well, any of the buildings. A. Oh, yes.

Q. Now was there also concrete men working there? A. Yes, sir.

Q. Now, who were they working for?

A. I don't know. I know there was a general contractor there by the name of Gaasland, but there might have been several different contractors for all I know.

Q. Well, you understood then that Mr. Haskell was a sub-contractor under the general contractor?

A. Yes, sir.

Q. And Gaasland was the general contractor?

A. Yes, sir.

Q. Now, did you eat regularly there at this mess house—messhall. I believe you referred to it as messhall? Did you eat regularly there?

(Testimony of Roy Callaway.)

A. Yes, sir.

Q. And do you know who was furnishing that food for you? A. No, sir.

Q. It was being operated by Gaasland, wasn't it? Gaasland Plumbing—or Gaasland Contractors?

A. I would think so. All that I know is that Haskell had to furnish our food. Now, how he done it I don't know.

Q. If he paid for it, that was all right with you?

A. Certainly, because we didn't pay for it.

Q. You didn't do any cooking yourself?

A. No, sir.

Q. —and neither did the—Haskell himself—or any of them? That ate at this mess house there?

A. Yes, sir.

Q. I see. Now did you ever fill one of those oil stoves, yourself? A. No, sir.

Q. Did you ever have anything to do with lighting it? A. No, sir. [95]

Q. Now, did you have any personal agreement other than the contract in writing here with any of the Haskell Plumbing people about employment over there? A. No, sir.

Q. I notice in answering Mr. Butcher's question—I believe it was kind of compound and I want to clear that. What you meant by the contract—was the written contract that was introduced here this morning in evidence between the Plumbers' Union and F. M. Haskell, who signed it, that was introduced here——

(Testimony of Roy Callaway.)

A. That was what I meant by the contract between Haskell and our Local.

Q. And that's the only contract you had in employment?           A. That's right.

Q. I see. Now did——

The Court: I would like to take a few minutes recess at this time, Counsel, but before doing so, I would like to make this suggestion: It is observed that all the testimony of this witness concerning the items of his claim for damage—and where he got them—and how long he had them—and the price he paid, were all covered by interrogatories which were propounded to him by the defendant. Now, it is also noted that similar interrogatories were propounded to—or submitted to each of the other nine plaintiffs, and that all of them have answered [96] excepting one, apparently, and that is W. Van Smith. Now, according to the Civil Rules of Procedure—The Rules of Civil Procedure—interrogatories taken in this manner may be used to the same extent as depositions. Reading from Rule 33 \* \* \* “for the use of the deposition of a party,” that is, to the same extent as provided in Rule 26(d). Now Rule 26(d) provides that “At the trial or upon the hearing—At the trial”—the rest of it is immaterial—“At the trial any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition \* \* \* in accordance with any one of the following provisions:

(Testimony of Roy Callaway.)

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony \* \* \*

(2)——

That is not the one I mean to refer to. It is subdivision

“(2) The deposition of a party \* \* \* may be used by an adverse party for any purpose.”

Now then, if these interrogatories can be used the same as a deposition under our rules, and if the deposition of a party may be used by an adverse party, why cannot we greatly shorten the progress of this trial by using these interrogatories, and why are they not offered? Now, the reason I ask that question is it strikes me that with each of these [97] nine witnesses—if the same examination be pursued—it would take at least—with eight more witnesses—at least eight more court hours. Why cannot we use such interrogatories?

Mr. Butcher: If it please Your Honor, your summation of the rule is exactly in accordance with my own. I had suggested to Mr. Bell, as he mentioned here earlier this morning, that I had suggested the matter to him in the form of a stipulation, that we agree that certain depositions—or these interrogatories—could be used in lieu of calling the witnesses; he declined to so stipulate. I then examined the rule to my own satisfaction and found out that the interrogatories and the answers to the interrogatories had the same effect as a deposition, and could be introduced into court in the same man-

(Testimony of Roy Callaway.)

ner as a deposition, and as Your Honor has said—for any purpose against the adverse party. I intended to do it with Mr. Holbrook, because through circumstances beyond our control we were unable to take his deposition, but I did intend to call the witnesses because I felt I had to call them, in some respects anyway, and I thought that to avoid an argument I would examine them fully. Now, I am going to move at this time, Your Honor, that the interrogatories propounded by Mr. Bell and answered by these witnesses under oath, in full and in great detail, in exactly the same manner as we have [98] re-examined this witness, now be introduced into evidence and be considered by the Court as evidence, and that the examination of these witnesses be restricted to whatever testimony they have pertaining to their employment and their location at King Salmon, and not as to the value of the goods lost.

Mr. Bell: Your Honor, I object to that as incompetent, irrelevant, immaterial, not binding on the defendant and depriving—

The Court: You object to what?

Mr. Bell: —examination of the witness—

The Court: You object to the motion as incompetent, irrelevant, and immaterial?

Mr. Bell: The motion is to introduce the documents and use them in lieu of evidence, and I say the documents are incompetent, irrelevant, and immaterial—

The Court: Well, which, Counsel, are they in-

(Testimony of Roy Callaway.)

competent—are they irrelevant, or are they immaterial? Will you please specify?

Mr. Bell: They are incompetent because they don't meet the rule of evidence; they are immaterial——

The Court: Why don't they meet the rules of evidence?

Mr. Bell: Why, I don't have any chance to see the witness and examine the witness on the witness stand, and you submit interrogatories to find out what your defense is. [99] That is the purpose of it.

The Court: But will you answer what the Court has just suggested as to what the rules provide?

Mr. Bell: Sure. It means we can impeach the witness with those interrogatories if we care to.

The Court: That's one reason.

Mr. Bell: The adverse party can——

The Court: No. No. The rule says the deposition of a party may be used by an adverse party for any purpose.

Mr. Bell: Adverse party. That's right. I'm the adverse party, I don't want to use that——

The Court: Well, I'm suggesting if you represent the adverse party, why can't he present these depositions—that he's moving to do so?

Mr. Bell: Your Honor, I won't argue with you. Honestly, if you just had time to think——

The Court: Well, I have had the time to think——

Mr. Bell: That's depriving me of the oppor-



(Testimony of Roy Callaway.)

tunity to face the witness, and he is here in the courtroom.

The Court: But you should have thought of that when you submitted the interrogatories.

Mr. Bell: Oh, no, that's a right we have for discovery. That's a method of discovery.

The Court: Well, but the rule provides that if you submit them they can be used. [100]

Mr. Bell: That's if I want to use them.

The Court: No, sir——

Mr. Bell: ——I'm the adverse party——

The Court: The adverse party may use them.

Mr. Bell: Why would he want to impeach his own witness?

The Court: He doesn't have to offer them to impeach, Mr. Bell.

Mr. Bell: Well, you heard my position. I'll stand by it.

The Court: The Court is very much inclined, and I think it is entirely proper, that the motion be granted, and that the interrogatories be received in evidence at this time—that is, each of them as depositions and be considered by the Court accordingly; and that further testimony of the witnesses will exclude the testimony covered by these interrogatories.

Mr. Bell: Your Honor, I wish an exception.

The Court: Yes, sir, you may have it. But still an exception, Counsel, are you still persuaded that an exception is necessary?

(Testimony of Roy Callaway.)

Mr. Bell: I am convinced more than ever since I read this recent case.

The Court: I'd like to hear from you on that case, because the rules very definitely state that no exception is necessary. [101]

Mr. Bell: I am referring to the statute. The statute says it. The Alaskan statute. I don't think the rules say anything of that kind.

The Court: I'll check that but I am quite certain it's the rules, because it is only since the adoption of the rules that we found it unnecessary to take exceptions.

Mr. Bell: No, the old statute, Your Honor, the old Alaskan statute says that you don't need to take exceptions, that the matter is treated as if an exception is taken. Your statute says that.

The Court: Well, perhaps I'm confused on that point. I'll look into it. Some times we forget which is which. Which was the rule before and which was the rule after we adopted these rules.

Mr. Bell: That is right, Your Honor, and that is why I am doing that.

The Court: Well, I will look into that.

Mr. Butcher: It is my understanding, Your Honor, under the old procedure we always took an exception: under the new procedure we have an automatic exception when we make the objection.

The Court: That is precisely my recollection. We will look into it.

Well, we will take a recess for ten minutes.

(Thereupon the court recessed from 2:50 until 3:00 o'clock.) [102]

The Court: Gentlemen, during the recess I had an opportunity to look into this question of "exception" and direct Counsel's attention to Rule 46, which is as I recalled it is as follows: "Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the Court the action which he desires the Court to take or his objection to the action of the Court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him." Now I cannot see in view of that rule where any formal exceptions to the rulings or orders of this court are necessary. If, however, you insist upon it, you may have an exception automatically to every adverse ruling of the Court.

Mr. Bell: All right. Let the reporter just write it then—exception taken.

The Court: Well, she has taken that down, no doubt.

Mr. Bell: All right. That will save time.

Mr. Butcher: The reporter will have to write something that isn't a part of what is said in open court. I don't think that the reporter should write

the word [103] "exception" each time he makes an objection because——

The Court: No. Oh, no. Of course not.

Mr. Bell: Well, if I make an objection, I am certainly going to want an exception if——

The Court: The Court has ruled that you need not take an exception, and that you may have an exception, if you desire, to every ruling of the Court. We need not repeat that——

Mr. Bell: All right.

The Court: ——and every objection made throughout the record.

Mr. Bell: All right.

The Court: Now, on this matter of the interrogatories being admitted in evidence as depositions or to the same effect as depositions under the Rule, I also direct counsel's attention to Section (f)—sub-section (f) of Rule 26.

Mr. Bell: 26. Sub-section (f)?

The Court: Yes. We had quoted from sub-section (d)—(d) (2). Now sub-section (f) provides that the introduction in evidence of the deposition for any other purpose than that of impeachment makes the deponent the witness of the party introducing the deposition, but that does not apply to this particular instance as the deposition of a party as distinguished from the deposition of a witness. And this,—that at the trial or [104] hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party. Therefore, Mr. Bell, if these interro-

gatories are admitted, as they have been, as depositions, you still, of course, have the opportunity to rebut any part of them. That you may do by calling any party as your own witness for such purpose, but it would not be subject to the ordinary rules of cross-examination. You may introduce any competent evidence to rebut the statements of the witness in these depositions, which does not deprive you of your opportunity to defend against the statements made by the witness. That seems to be the plain intent and purpose of the rule,—to simplify our procedure, avoid endless taking of detail which would not be helpful at all in the determination of the issues of the case. Therefore, we adhere to the former ruling that these interrogatories be admitted in evidence upon the motion made by counsel for the plaintiffs, with the understanding that the defendant may rebut, then, the evidence contained in them by competent testimony.

Mr. Bell: But, as I understand, I will not be permitted to cross-examine the witness concerning them?

The Court: That is true.

Mr. Bell: Your Honor, that was what I insisted on——

The Court: Yes. [105]

Mr. Bell: ——having the privilege of cross-examining the witness.

The Court: I considered that very carefully. I do not believe that such is permitted under this procedure.

Mr. Butcher: I believe Mr. Callaway was on the stand.

The Court: Yes, Mr. Callaway may be recalled.

Mr. Butcher: I have a couple of questions to ask Mr. Callaway on redirect, Your Honor, and I would like him to return to the stand.

The Court: Yes. Mr. Callaway, will you take the stand.

(The witness, Mr. Callaway, resumed the stand.)

Mr. Bell: Say, Mr. Butcher, if you don't mind, I would like to ask him one more question before you start on cross-examination. (Redirect examination.)

Attorney for Defendant:

Q. You testified about the oil stoves and about who was responsible for them. Now, do you know personally who attended those stoves or took care of them?      A. No, sir.

Q. The stoves were just there and you saw them and know that they were used for heating?

A. I wasn't there but about nine or ten days before the fire. [106]

Q. And during that time you didn't see anyone tending the stoves?

A. I was working all day—each day.

Q. And you don't know who owned the Quonset hut?      A. No, sir.

Q. Or who furnished it?      A. No, sir.

Mr. Bell: I see. That's all. [107]

(Testimony of Roy Callaway.)

Examination by the Court

Q. The Court is not quite clear, Mr. Callaway, on your testimony regarding the valuation placed on these various articles of clothing and personal effects—as to whether in all cases they were cost—or whether you allowed for depreciation. Will you inform me as to that?

A. Your Honor, some of those that was new was at cost; and some of them that had been used was at the valuation I fixed.

Q. I thought that I understood from your testimony that in each case as to the clothing, that was the cost.

A. Some of the—like the suit it was practically new and it cost me that to replace it. There's one instance there in the shoes——

Q. Oh, yes. It was either cost or replacement value, the figure which you used? A. Yes, sir.

Q. Well, then in neither event have you allowed for depreciation—or have you?

A. I have in some of them, yes. Like on the shoes there. I had one pair of shoes, and I lost two pair of work shoes. One pair cost me \$35.00, but I had worn 'em so I valued the both pair at \$35.00.

Q. I understood that, but that was the only instance I heard in which you used the depreciated value. A. And the clock.

Q. And the clock. Yes.

The Court: Now, thank you; that is all.

(The witness left the stand.)

Mr. Butcher: Mr. Judson. I forgot to ask, Your Honor. I have been in the habit of standing up before Judge McCarrey, and I wondered if Mr. Bell could remain seated; now does Your Honor have a ruling on that?

Mr. Bell: Oh, excuse me, if I did.

The Court: In this department, gentlemen, we have not required the Counsel to stand, and there appears to be no need for it, and we are a little less formal. We also are in this situation that the counsel table is closer to the witness and to the reporter so there is no need of it. So you may be seated if you wish.

Mr. Bell: Thank you. I didn't mean to do that, but since you said it is all right, I'll be seated. [110]

The Court: Oh, yes. I'm sorry I didn't direct your attention to it, Counsel.

### THOMAS B. JUDSON

was called as a witness in his own behalf, having been duly sworn previously, testified as follows:

#### Direct Examination

By Attorney for Plaintiffs:

Q. Will you state your full name?

A. Thomas B. Judson.

Q. And are you the Tommy Judson whose name has been placed on the lawsuit against Haskell Plumbing and Heating Company, filed in the District Court at Anchorage, Alaska?

A. Yes, sir.



(Testimony of Thomas B. Judson.)

Q. You are the Tommy Judson who is a party to that action?      A. Yes, I am.

Q. What is your occupation, Mr. Judson?

A. Plumber.

Q. Did you ever work for Haskell Plumbing and Heating Co?      A. Yes, I did.

Q. Will you state when and under what circumstances?

A. Well, I was dispatched on September 6 to the Haskell Plumbing and Heating Company.

Q. September 6 of what year?

A. 1951. The Haskell Plumbing and Heating of King Salmon, Alaska. [111]

Q. And was that under the terms of any agreement that you know?

A. It was under the procedure we go by to go to work.

Q. Well, what was that procedure?

A. We go to the Local Union and get on the work list, and when a company calls in for—in this instance, Haskell called for me and I got a ticket and proceeded to King Salmon.

Q. Well, did you know anything about an agreement or a contract between Haskell Plumbing and Heating and the Union?

A. Why yes, we have a contract with all contractors.

Q. Was this procedure you spoke of under the terms of that contract?

Mr. Bell: I object to that as leading and suggestive.

(Testimony of Thomas B. Judson.)

Mr. Butcher: I'll withdraw the question.

The Court: It is leading.

Q. Was this hiring when you worked for Haskell under them?

A. It was under the ruling that Local 367 signed with the Haskell Plumbing and Heating on all contracts.

Q. By the word "ruling" do you mean the word "contract"?

A. The word contract, yes, sir.

Q. And you were aware of that contract?

A. Yes.

Q. You stated that was on September 16th?

A. September 6, 1951.

Q. September 6. Now pursuant to that dispatch slip, what did you do?

A. Well, I went to the hall and Sam Ogle wrote me out a dispatch slip.

Q. I show you Plaintiff's Exhibit number 2, and ask you if you recognize that document?

A. Yes, I do.

Q. And what is it?

A. A dispatch from Local 367, to the Haskell Plumbing and Heating.

Q. Is that copy the one that was given to you?

A. This is a duplicate.

Q. It is a duplicate. And what, Mr. Judson, did you do with the original?

(Testimony of Thomas B. Judson.)

A. I turned it over to the job steward when I arrived on the job at King Salmon.

Q. Who was that job steward?

A. Michael Cullinane.

Q. Now, after you got the dispatch slip and before you arrived at King Salmon, what procedure was followed in getting over there?

A. I went to the Pacific Northern Airlines office and presented my dispatch and they had a ticket waiting for me to go to King Salmon. [113]

Q. What did you have with you at that time?

A. Well, I picked up my gear.

Q. Your gear? A. Yes.

Q. That was your personal property?

A. Personal belongings.

Q. When did you—did the flight to King Salmon take longer than one day—the flight?

A. No, ordinarily not.

Q. You arrived on the same day? A. Yes.

Q. Now, when you arrived there what happened?

A. I believe the foreman, Mr. Mulcahy, met us at the——

Q. The foreman for who?

A. Haskell Plumbing and Heating met us at the airport and took us to the barracks.

Q. And how did he take you to the barracks?

A. In a weapons carrier belonging to Haskell Plumbing and Heating.

Q. You say he took you to the barracks. What barracks?

(Testimony of Thomas B. Judson.)

A. The barracks which in our agreement they furnished.

Mr. Bell: I object to referring to the agreement. The agreement speaks for itself.

Mr. Butcher: What——

The Court: Wait just a moment. You are objecting [114] to the answer rather than to the question, I presume?

Mr. Bell: Yes, because it's not responsive to his question——

Mr. Butcher: Well, Your Honor, the ruling is that they—not being responsive is available only to the person that requests it and not to another party. I asked the question——

The Court: I don't think that's true.

Mr. Butcher: It is true, Your Honor, if I may say so. Let me illustrate. I asked a question and he doesn't answer the question. I'm asking the question and I'm entitled to an answer, so I object on the grounds that it's not responsive and insist that he answer my question. Now, if he doesn't answer the question but I'm satisfied with what he says, I don't make any objection, but other counsel can not object if I'm satisfied that he's answered my question, Your Honor.

The Court: Well, if that were the true rule of evidence, then the witness could make some answer which is wholly unresponsive and the adverse party has no opportunity to object to its competency or materiality. I cannot conceive that that is the rule. In this particular instance, however, it seems rather

(Testimony of Thomas B. Judson.)

immaterial. The answer stated that he was taken to a barracks——

Mr. Bell: If he says just “taken to a barracks”—— [115]

The Court: ——a barracks.

Mr. Bell: ——I have no objection. It was what he started following it with as provided in the contract——

The Court: Well, that portion of the answer in which you referred to the contract, being a conclusion of law, will be stricken.

Q. ( By attorney for plaintiff): What was the nature of the barracks?

A. It was a Quon-set hut with a number of bunks in there. I believe at the time there were about sixteen bunks, and a place to hang our clothes and a washroom.

Q. Were other men occupying that barracks?

A. Yes, there were.

Q. And were they fellow employees of yours?

A. Yes, they were.

Q. And who were they working for?

A. Haskell Plumbing and Heating.

Q. Now in this barracks, was there storage space provided?

A. Well, there was not really storage space. We put our gear around our own bunk and had hooks and such as that to hang our clothes on.

Q. What other facilities were available besides the bed?

(Testimony of Thomas B. Judson.)

A. Well, a washroom, unless you built a cupboard out of an eggcrate or something like that.

Q. What other facilities to make you comfortable there?

A. Well, they furnished bedding; and they had this rack to hang your clothes on.

Q. Was there any heat in the building?

A. And of course they naturally heated them.

Q. How was it heated?

A. With oil stoves; two oil stoves.

Q. Were they together or at each end of the barracks?

A. One on each end of the barracks.

Q. One on each end of the barracks. And who furnished these facilities, if you know?

A. Haskell Plumbing and Heating.

Q. While you were living at the barracks, were you working?      A. Yes, I was.

Q. And who were you working for?

A. Haskell Plumbing and Heating.

Q. And did you receive checks for your work?

A. Yes, I did.

Q. Who issued to you that check?

A. Haskell Plumbing and Heating.

Q. And what type of work were you doing?

A. I was working on new construction on the project about a mile from where we lived.

Q. And calling your attention to October 11, 1951, were you away from the barracks that day at all? [117]      A. Yes, I was.

(Testimony of Thomas B. Judson.)

Q. And in performance with your regular duty?

A. Yes.

Q. Did anything unusual happen, and if so tell us about it?

A. Well, on that particular day I was working in the power house and about one-thirty the foreman, Mulcahy, came in and said "Come on, fellows, the barracks is burning down." I and the other fellows jumped in the car and we drove over to what was left of the barracks. It was still burning.

Q. By the time you arrived there, what was the condition of the fire? As to its structure?

A. Just all flames. There was hardly anything——

Q. No chance of entering?

A. Not a chance in the world.

Q. Now, at the time of the fire or immediately thereafter, did you make any investigation as to the cause of the fire?

A. Well, the next day we looked around in there, and it just appeared to me——

Mr. Bell: I object to the answer "appeared to me", your Honor.

Mr. Butcher: Tell us what you saw.

The Court: What you saw and observed. That is correct.

A. There really wasn't much to see; nothing but a twisted bunch of steel—ashes—and the stove was——appeared to be——

Mr. Bell: I object to how the stoves appeared to

(Testimony of Thomas B. Judson.)

be. If he can testify as to what he found, that's all right. [118]

Mr. Butcher: You can testify as to what the stove looked like.

The Court: ——to what it looked like, certainly.

Mr. Bell: Yes, what did it look like?

A. Well there was just a shell of it left there; split open. Well there really wasn't anything left of it hardly; just melted up; crumbled.

Q. Which stove was that?

A. That was the first one.

Q. What was the condition of the other with respect to the first one?

A. I don't recall it; I mean I was just disgusted, I didn't look.

Q. As a result of your investigation of the stove, are you able to give us an opinion as to what happened to the stove?

Mr. Bell: I object to that as incompetent, irrelevant, and immaterial—an opinion.

The Court: I doubt if the witness is qualified to give an opinion in that respect. It would seem that that should be done—an opinion in a case like this should be done by someone qualified in that line of work; not any layman.

Mr. Butcher: This man is hardly a layman, Your Honor; he is a plumber. As a plumber he has obviously engaged in installation of heating equipment and piping. If he were not such, it would be within the ability of an ordinary, [119] intelligent person to determine whether a stove that had been



(Testimony of Thomas B. Judson.)

in a fire had been—burst open by explosion of some kind. Had burst. In other words if he saw it split in two and the doors off, he would certainly as an ordinary observer be——

The Court: Well that might be, counsel. But if that is the basis upon which you put your question, as to opinion, he should be further qualified as to experience in that line. When I suggested a minute ago in that line of business I was thinking of course of a fireman or fire marshals or fire inspectors. But a plumber who has made a living by installing heating equipment might be so competent, if you will qualify him first.

Q. (By attorney for Plaintiff): How long have you been a plumber? A. 22 years.

Q. And are you a journeyman plumber?

A. Yes, I am.

Q. As a journeyman plumber, are you competent and qualified to work in all types of plumbing?

A. Yes, I am.

Q. And with reference to heating systems, have you ever installed heating systems?

A. Yes, I have.

Q. Are you familiar with furnaces and stoves?

A. Yes.

Q. And you know how they are installed, and what safety measures to be taken to keep them operating safely? A. Yes, I did.

Q. And if a stove pipe that you had experience with, burst open by internal force, would you be in a position to make an observation as to that?

(Testimony of Thomas B. Judson.)

A. Well I couldn't qualify as to that—that was the first fire I was ever in.

Q. What was that?

A. I say I couldn't qualify to definitely say that if a stove had actually exploded—as I say it was the first fire I was ever in or seen one in that condition.

Q. Now do you know whether the stove exploded or did not?

Mr. Bell: Now I object to that because he just stated—he said he could not qualify on that.

Mr. Butcher: He said he couldn't qualify as to whether the stove exploded in the fire or not. I am asking him if he knows, as a matter of fact, whether there was an explosion of the stove.

The Court: Well, counsel, I would say it is quite obvious that he wouldn't know if he was a mile and a half away; except by his observations.

Q. Now you lost certain personal property in this fire? A. Yes, I did. [121]

Q. And that personal property, you have set forth in full, to the best of your ability, in answers to interrogatories that were submitted to you—answering in—I wonder if Your Honor having the file could give me the data?

The Court: Oh, yes. Mr. Judson—

Mr. Butcher: Mr. Judson.

The Court: Mr. Judson. Yes. (The Court looks for the information.) The answer to interrogatories signed by Thomas B. Judson on February 8, 1957 (laughter). Yes, that is right—1957. Probably it is

(Testimony of Thomas B. Judson.)

1954 because it was filed on April 2, 1954, and with that correction——

Mr. Butcher: The interrogatories were submitted in 1953, Your Honor.

The Court: I see what's happened here. The notary taking the acknowledgment has used the same year date as when his commission expires, which no doubt explains the error. We will change this to '54, by leave of counsel. February '54.

Q. (By attorney for plaintiffs): Is that your recollection when you answered these interrogatories? A. I believe so.

Q. And at that time, you set forth to the best of your ability, the items you lost and the price thereof. Is that correct?

A. That's right. [122]

Mr. Bell: Now, Your Honor, I want to cross-examine him about what he proved—or attempting to prove—and did not rely upon the interrogatories, but has attempted to prove by this witness that all of those prices in there are correct. Now I have a right to cross-examine him, Your Honor.

Mr. Butcher: (laughter) If I were introducing a deposition, I'd still have to tie the deposition in with the facts and all that stuff.

The Court: I thought we could avoid all of this, but you did ask him whether the statements made in his answers to the interrogatories were correct answers to the best of his ability.

Mr. Butcher: Well, I withdraw that question then, Your Honor, and ask that it be stricken.

(Testimony of Thomas B. Judson.)

The Court: I fear that it is too late. I would say that that opens the matter up for cross-examination.

Mr. Butcher: I withdraw it then and ask Your Honor to disregard it and to strike it from the record.

Mr. Bell: I think he's laid it open now.

The Court: I doubt if we can do that now.

Mr. Butcher: Well, then, Your Honor, if Your Honor can't entertain that, I insist if I have not tied this witness into that deposition, as the Tommy Judson who took that deposition, and that those were his answers, then he could have found fault with that, and I did it simply to avoid [123] argument. Now, certainly we have no jury here, and if I withdraw that, Your Honor is going to have the depositions before him, or the interrogatories and I withdraw any reference that this witness made to those interrogatories; except, perhaps, I am sure I've got to ask him if he—I want you to understand that I am not asking him one word about the property that he has lost, and I've certainly got to tie them in with the deposition someway, and I think that I should at least ask him if he is the Tommy Judson who answered certain interrogatories propounded to him and then stop there. Now, if I withdraw all but that——

The Court: Well, upon further reflection, I believe that it is the right of a party to withdraw the question and the answer to that question. It is rather unique in my experience, but I believe it can be done. And therefore such may be ordered. It is

(Testimony of Thomas B. Judson.)

not the purpose, counsel, to in this ruling to try and hide anything but to simplify the issues for trial. That is all that we are trying to arrive at here. The principal issue here is whether or not the defendant, Haskell Plumbing and Heating Company, is liable for this damage, and if we could save a couple of days time without prejudice and without damage to the substantial rights of the party by not going into repetitious matters that are already before the Court, it seems only in the interest of justice and proper expediency of court procedure if we could use that ruling. If I am [124] wrong I can be corrected, but I do not believe that the rule contemplates cross-examination.

Mr. Bell: All right, Your Honor. I call your attention to the accounting at the bottom of the list there—just a blank statement—Work Clothes \$300.00. On the second page he sues for \$300 for just work clothes. \$300.00.

The Court: Well, now let's see. I believe it is fully explained in item 51 of the interrogatories. Fully explained.

Mr. Bell: Well, I understand, Your Honor, and I don't want to argue with you, but I just want you to understand my theory too, and I am not going to argue with you about it. I think—of course you know that I think you are wrong in admitting them, but I am not going to keep repeating that; but to show you where I think's it's terribly wrong to allow your ruling to stand on a thing like that. That's why I'm calling your attention to it; but I

(Testimony of Thomas B. Judson.)

am not trying to overrule the Court because whatever he says goes, and I have to be bound by it.

The Court: Very well.

Mr. Butcher: I have finished with the witness, Your Honor. He is subject now to cross-examination on the material covered.

The Court: Yes. You may cross-examine, then.

Mr. Bell: As I understand it then, I would not be permitted to go into the value of the items at this time? [125]

The Court: That is correct.

Mr. Bell: All right. Exception.

### Cross Examination

By Defense Attorney:

Q. Mr. Judson, is "Tommy" your real name?

A. Thomas is my real name.

Q. Thomas what?             A. Thomas Benjamin.

Q. Thomas Benjamin——             A. Judson.

Q. Judson. And where did the name "Tommy" come from, just a nick-name?             A. Yes.

Q. When did you go to King Salmon?

A. September 6, 1951.

Q. And you went on the PNA?             A. Yes.

Q. I believe you stated, someone met you at the airfield?

A. Thomas Mulcahy, the Haskell Plumbing and Heating foreman.

Q. And you went in a car from there over to the barracks, or was that a Quon-set hut?

A. Quon-set hut, yes.

(Testimony of Thomas B. Judson.)

Q. That was a large Quon-set hut, was it not?

A. Yes. [126]

Q. How many people were staying in this Quon-set hut?

A. Well at that particular time I would say probably fourteen or fifteen men.

Q. And how many plumbers and steamfitters were working on the job?

A. Oh, I'd roughly say twelve or thirteen. There was two pipe liners.

Q. Pipe lighters. Now what are pipe lighters?

Mr. Butcher: Liners.

A. Pipe covers. They cover steampipes and such as that.

Q. Oh these men were covering up steam pipes; they were not plumbers? A. No.

Q. Now were they working for the general contractor on the job or who were they working for?

A. I believe for an asbestos pipe covering—. I don't recall their name.

Q. But they were working for an asbestos company other than the people you were working for?

A. Well they were indirectly under Haskell Plumbing and Heating. They did the whole job, and then some contractor—

Q. Now you say they did the job; how do you know that, Mr. Judson?

A. Well I don't know it; it is common procedure.

Q. Well, you don't know whether Haskell Plumbing and Heating [127] Company or F. M.

(Testimony of Thomas B. Judson.)

Haskell or who it was did the job; personally you don't, do you?      A. No, I don't.

Q. Now, you went there and worked for somebody named Haskell, as far as you know?

A. Haskell Plumbing and Heating Company.

Q. Now did you have any other agreement with Haskell Plumbing and Heating as you say, other than the written contract that was introduced here this morning?      A. No, not that I know of.

Q. And you just went to work there as a journeyman plumber and received pay for your time?

A. Yes.

Q. Now where did you eat, Mr. Judson?

A. In a general messhall.

Q. That general messhall was for all employees on the works, was it?      A. I believe so.

Q. About how many employees were there working there?      A. Oh roughly a hundred.

Q. Well did Gaasland Construction Company have employees there?      A. I believe so.

Q. They were the general contractors on the job, were they not? [128]      A. I believe so.

Q. And as far as you know if some Haskell—whether it was Haskell Plumbing and Heating or whatever it was—Haskell had plumbing contract separate—as a sub-contract?

A. That had a separate contract and I suppose——

Q. That's the way you understood it?

A. Yes.

Q. Now, when you went there to this place, were



(Testimony of Thomas B. Judson.)

you assigned a bed or something, or did you just pick a cot, and put your stuff there?

A. Well, there was three of us and there was more than three empty bunks, and they were made up and we just took them.

Q. You just took the ones that was made up? They were always kept clean and sheets changed by somebody. Were they?

A. By the bull-cook, yes.

Q. And the bull-cook was from the mess house, wasn't he?

A. Well I don't know. They were——

Q. Did you ever see the fellow?

A. I can't recall; no. He was doing his work while we were out on the construction area.

Q. And you don't know who filled the tank with oil outside for the stove?      A. No, I don't.

Q. Did you ever see it filled?

A. I don't recall. [129]

Q. It came in—as I understand it, it came in by pipe-line, from copper line from the barrels out in the yard and connected to the stove inside?

A. Yes, I believe copper tubing.

Q. Now, then all that you know about the fire—the first thing you knew about it—and all you knew about it was that it started while you were away working?      A. Yes.

Q. And when you got there it was so hot and burning so hard you couldn't go inside to retrieve your equipment?      A. No, sir.

Q. Then you don't know what caused the fire,

(Testimony of Thomas B. Judson.)

of your own knowledge?      A. No, I don't.

Q. You don't know who furnished the oil, and who furnished the bunk house and the stoves, do you?      A. No, I don't.

Q. How long did you stay there, Mr. Judson, after the fire was over?

A. I left the next day. [130]

\* \* \* \* \*

### GALORD W. WEEKS

was then called as a witness in his own behalf, was duly sworn, and testified as follows:

#### Direct Examination

By Attorney for Plaintiff:

Q. Will you state your full name?

A. Galord Winfred Weeks.

The Court: Did you get that, Miss McDonnell?

Reporter: Galord Weeks?

The Court: Galord.

Q. Are you the Jimmy Weeks that was employed in October of 1951 by the Haskell Plumbing and Heating Company?      A. Yes.

Q. And you are sometimes known as "Jimmy"?

A. Yes, sir. [131]

Q. Are you the same Jimmy Weeks who is a plaintiff to an action in the District Court against the Haskell Plumbing and Heating Company?

A. Yes.

Q. Mr. Weeks, what is your occupation?

A. I'm a welder. A pipe welder, for the plumbing and fitting trade.

(Testimony of Galord W. Weeks.)

Q. A pipe welder? A. Yes.

Q. And is that different from a plumber?

A. Well, it comes under the same class—but the work we do, clean pipes, you know.

Q. Are you a member of the Plumbers Local 367? A. Yes. Yes, I am.

Q. And a member in full standing?

A. Yes.

Q. The same rights as all other members?

A. Yes.

Q. Were you a member of that Local in the summer of 1951? A. Yes, I was.

Q. And during the fall of 1951, were you dispatched to a job for the Haskell Plumbing and Heating Company? A. I was.

Q. And do you know the date?

A. It was in June. I think it was June the 10th; I'm not sure. [132]

Q. In June. Do you know if at that time there was any kind of an agreement existing between you—or between your Union and Haskell Plumbing and Heating?

A. Yes, I know they had an agreement drawn up between the Union and the contractor, Haskell.

Q. And did you know that when you became employed that you were working under that agreement? A. Yes, I did.

Q. I'll hand you a document which is marked Plaintiff's Exhibit number 2, and will ask you to identify that slip if you know what it is. What is it?

(Testimony of Galord W. Weeks.)

A. This is a duplicate of a slip that the business agent gives you to go to work.

Q. To go to work? A. Yes.

Q. And what become of the original?

A. Well, I give it to the shop steward when I got down to King Salmon.

Q. You gave it to your shop steward when you got down to King Salmon? A. Yes.

Q. Who was that shop steward?

A. Mike Cullinane.

Q. You don't know what he did with it?

A. No, I don't.

Q. You did then go to King Salmon to work for Haskell Plumbing [133] and Heating Company?

A. Yes.

Q. What day did you go over there?

A. June the 19th.

Q. June the 19th?

A. —I think. Yes, sir.

Q. Did you remain there throughout that summer? A. Yes, I did.

Q. The summer of 1951. Is that correct?

A. Yes.

Q. You remained there steadily throughout that summer? A. Yes.

Q. And were you there in October?

A. Yes, I was.

Q. Now, calling your attention to the time you arrived there—calling your attention to prior to the time you left Anchorage, was there some arrangement made for your transportation?

(Testimony of Galord W. Weeks.)

A. Yes, that was all made by the Union, who took care of that. All we had to do was to go down and pick up our airplane tickets, and they told us when we could go down there by airplane.

Q. And you were informed? A. Yes.

Q. And did you take care of that—gear and personal property [134] with you?

A. Yes, I did.

Q. Now—you were then flown to King Salmon?

A. Yes.

Q. Now when you arrived at King Salmon, what happened?

A. Well the foreman picked me up and took me up——

Q. What foreman? A. Tommy Mulcahy.

Q. He was the foreman for who?

A. For Haskell Plumbing and Heating, and he took us up to the barracks and showed us where we should stay.

Q. Took you up to a barracks? A. Yes.

Q. And showed you where you were to stay?

A. Yes.

Q. By that last statement, do you mean showed you where you were to sleep or just the building?

A. Showed me where I was to sleep—where the rest of the boys was staying.

Q. In other words he assigned a bunk or bed to you? A. Yes.

Q. Now were you able to find a place for your gear in that building?

A. Yes, there were hooks, and you had a suit-

(Testimony of Galord W. Weeks.)

case you could put under your bed; and hang it up, and someone made a box [135] for us to put our stuff in.

Q. And you were working there October 11, 1951? A. Yes, I was.

Q. What kind of work, and where were you working on that day?

A. Well on that day I was working on the job —when the fire took place.

Q. Where was the job?

A. Well, it was better than a mile from the bunk house.

Q. Better than a mile from the bunk house?

A. Yes.

Q. And did anything unusual happen on that day? A. Yes.

Q. What happened?

A. Well, the barracks burned down.

Q. How did you learn about it?

A. Tommy Mulcahy told us.

Q. Tommy Mulcahy told you? A. Yes.

Q. And did you go to the scene of the fire?

A. Yes, I did.

Q. What did you see when you got there?

A. I didn't see nothing but flames of the building.

Q. Did you find any opportunity of getting your personal possessions? A. No, I didn't. [136]

Q. The fire was too far advanced?

A. Yes.

(Testimony of Galord W. Weeks.)

Q. Did you remain there for any period of time after the fire?

A. Well, I think it was a day or two days after the fire.

Q. Then what did you do?                   A. Well?

Q. Then, what did you do?

A. Well, we worked one half a day I think.

Q. Did you leave King Salmon, then?

A. Yes.

Q. And where did you go?

A. Come back to Anchorage.

Q. Now, while you were located there, and working for Haskell Plumbing and Heating Company, who paid your wages?

A. Haskell Plumbing and Heating.

Q. And who provided your housing, if you know?

A. Well, Haskell——

Mr. Bell: Now I object to that—unless he knows.

Mr. Butcher: I asked him “if he knew.”

Mr. Bell: If he knows—all right.

The Court: You may answer.

A. Haskell Plumbing and Heating, as far as I know.

Q. And who provided your food, if you know?

A. That was took care of by Haskell. [137]

Mr. Butcher: That’s all.

The Court: You may cross examine.

\* \* \* \* \*

(Testimony of Galord W. Weeks.)

Cross Examination

By Defense Attorney:

Q. What kind of work did you say you were doing over there? A. I was a pipe welder.

Q. Now that's not plumbing, is it?

A. Well no. It comes under the same heading. We belong to the same Local—the same Union. We can work as plumbers—welders—or fitters.

Q. I see. Now you say you went over there June 10, 1951?

A. It was in June sometime. I don't know the—

Q. What plane did you ride? What airline company?

A. Well, I don't know for sure, but I thought it was a Consolidated plane.

Q. You thought it was with the Consolidated?

A. Yes.

Q. Now did you ever see the contract entered into between the plumbing company—or I mean the Plumbers' Union and the Haskell people. Did you ever see that contract?

A. Well I can't recall I did.

Q. You told Mr. Butcher, I believe—or he asked you if you knew there was such a contract—and you told him you did; now how did you know that?

A. Well I know that we have an agreement—contract written [138] up every year.

Q. With the general contractors?

A. No, with the sub-contractors.

Q. With the sub-contractors? A. Yes.

Q. And you don't know then, of your own per-



(Testimony of Galord W. Weeks.)

sonal knowledge,—you didn't know what that contract contained, did you?

A. Well no, I didn't know what—all it contained, but I know some of what it contained.

Q. Well, you never saw it and yet you knew what it contained. Is that what you want to say?

A. I don't follow you there.

Q. Well, you never did see the contract, did you?

A. Well, I never did see the original contract, but I had seen a copy of it.

Q. Well, where did you see a copy of the one that was entered into in 1951?

A. Well, we have one on the job.

Q. Did you see it?           A. Yes, I have.

Q. What did it say?

A. Well, I can't remember what it says now.

Mr. Butcher: (interposing) Now, just a moment——

The Court: Just a moment.

Mr. Butcher: Your Honor, the contract speaks for itself. [139] This man is not expected, and cannot and should not be expected, to say what the contract says, or we would be here all day.

The Court: Yes. I do not think that question can reasonably be answered; if you intend that he should recite everything that the contract says.

Mr. Bell: Well, if he——

The Court: ——The question is hardy proper.

Mr. Bell ——just tell us something in it so that we think that maybe he did see it.

(Testimony of Galord W. Weeks.)

Mr. Butcher: Counsel can ask leading questions. Let him call his attention to that, if he wants to.

The Court: Possibly, or counsel may ask whether he recalls any particular subject of the contract. That would be——

Mr. Bell: Well, do you remember any particular subject in that contract?

Witness: Well, one particular thing I know is in there: Board and room is in there—to be furnished by the company, and we should be paid whatever date is set—on a certain day of the week.

Q. (By defense attorney) Now, then the board and room; they had to pay for that for you wherever you went? A. Yes.

Mr. Butcher: Now—— [140]

Mr. Bell: Now, let him answer. Now I'm cross examining, Mr. Butcher.

Mr. Butcher: Do you object to me making objections, Mr. Bell?

Mr. Bell: No, I don't want you to tell the witness what to say.

Mr. Butcher: I'm not telling the witness what to say. (To Court) Mr. Bell, in asking the question, misquotes the evidence——

The Court: Yes?

Mr. Butcher: ——he assumes a fact that isn't in evidence; and I object to that, Your Honor.

The Court: Well, I do not think it was his intention. What Mr. Bell asked was "Did the company pay for his board and room." Probably what you meant to say was "furnish"; is it not?

(Testimony of Galord W. Weeks.)

Mr. Bell: The contractor did pay for it.

The Court: Mr. Weeks, did you find such a reference in your contract?

(Mr. Bell and Mr. Butcher examining document.)

Mr. Bell: Now, is this the part that you——

Mr. Butcher: Now, Your Honor, I would request that the last question be answered. His question “whether it was paid for or furnished.” And counsel has said the contract said, “paid for”.

The Court: Well, do you wish to withdraw that last [141] question which was not answered?

Mr. Bell: Yes, I withdraw it——

The Court: Very well, and we will start over again.

Q. (By defense attorney): ——to save time. Now, do you remember that the employers were to furnish you board and room, or were to pay board?

A. Well, I understood it was to be furnished.

Q. Well didn't you stay at the Skytel part of the time?      A. No, I didn't.

Q. Do you know whether or not other plumbers did stay up there?      A. No, I don't.

Q. Well, when you first went there, were the plumbers eating at the mess house at that time?

A. Yes, they was.

Q. Do you know when they started eating at the mess house?      A. No, I don't.

Q. Had they been, so far as you know, eating at the Skytel or—was that the name of that place?

(Testimony of Galord W. Weeks.)

Skytel? What was the name of that eating place, there?

A. Well I can't recall. I think that's the name of it.

Q. Well it was "sky" something wasn't it?

A. I think so.

Q. Now do you know that the plumbers had been eating up there? A. No, I don't. [142]

Q. Not while you were there? A. No.

Q. Now, do you know whether or not that if you had wanted to—you could under the rules—they were enforced there—you could have stayed—boarded yourself and drew \$5.75 a day from the company for your own board and room?

A. You mean that——

Q. In other words—say you had your wife with you and you were furnishing your own board and room—would the company pay you \$5.75 a day extra for you furnishing your board and room?

Mr. Butcher: (interposing) I object to questions that are beyond the scope of the contract. This contract is clear enough, and he has stated that he worked under it, and Mr. Bell now is going beyond the terms of the contract and trying to make this witness state something beyond those terms——

The Court: I think that is correct.

Mr. Butcher: ——and asked if he could collect \$5.75 from the company which the contract does not provide——

The Court: That is correct. It is entirely immaterial to the Court whether he could have boarded

(Testimony of Galord W. Weeks.)

some place else or not. What difference can it conceivably make? The question is where did he board—not where could he have boarded.

Q. Now do you know who furnished the food that you ate there?

A. As far as I know it was furnished by Haskell Plumbing and Heating Company. [143]

Q. Now, you do know that the boarding house was—the general boarding house, was run by the general contractor, Gaasland Construction Company; don't you?

A. Well, I couldn't say; I have no proof.

Q. But you do know that all the people of Gaasland's employees ate there at the same place you did? A. Yes.

Q. And how many people were employed by the plumbing contractor—or we'll say by Haskell or whatever that name was?

A. You mean on that particular job?

Q. Yes. A. Oh, I'd say ten.

Q. Ten. Now how many ate at that standing room—or bunk—or place they boarded you people. How many ate there?

A. Well, we all ate there as far as I know.

Q. Well, about how many were there altogether? Who ate there?

A. I don't know. There was over a hundred.

Q. Over a hundred.

A. —I'd say.

Q. And—

(Testimony of Galord W. Weeks.)

The Court: May I interrupt, Mr. Bell. What was that name you said—gas-tun-al?

Mr. Bell: Gaasland—— [144]

The Court: Gaasland.

Mr. Bell: Gaasland Construction Company. G-a-a-s-l-a-n-d Construction Company, I believe is the name. I can give you the correct name, Your Honor, I've got it here, somewhere.

The Court: Yes. You refer to the general contractor?

Mr. Bell: Yes, the general contractor. I believe I can give it to you so we won't be confused. I'm confused about it myself. (Searches through file.) Gaasland.—G-a-a-s-l-a-n-d.

The Court: ——double a-s-

Mr. Bell: G-a-a-s-l-a-n-d Construction Company. Company is spelled out.

Q. Now, did you understand the Gaasland Construction Company was the general contractor on the job? A. Yes.

Q. And you did understand that they did the cooking of the food and served to you people?

A. Well, I couldn't say whether they done it or whether it was a sub-contractor. I don't know what.

Q. You don't know who cooked the food?

A. No.

Q. None of you people employed by the plumbing company there cooked it? A. No.

Q. And down there at the barracks where you

(Testimony of Galord W. Weeks.)

stayed—do [145] you know who furnished the oil down there?      A. Well, no I don't.

Q. You never did see them put the oil in the barrels?      A. No.

Q. Do you know who owned the Quonset hut?

A. No.

Mr. Bell: I think that's all. [146]

\* \* \* \* \*

### LYLE WESLEY FRANZ

was then called as a witness in his own behalf, was duly sworn, and testified as follows:

#### Direct Examination

By Attorney for the Plaintiffs:

Q. Well you state your full name to the Court?

A. Lyle Wesley Franz.

Q. Mr. Franz, are you the "Ole" Franz who is a party to a lawsuit against Haskell Plumbing and Heating Company? [147]      A. Yes.

Q. And what does the name "Ole" signify or mean?      A. It's just a nickname.

Q. It's just a nickname. In other words you answer to that name?      A. Yes.

Q. This person listed in this complaint is you?

A. That's right.

Q. Now what is your occupation, Mr. Franz?

A. Steamfitter and plumber.

Q. And how long have you been a steamfitter and plumber?      A. About twenty years.

Q. In the various fields of plumbing?

A. Yes.

(Testimony of Lyle Wesley Franz.)

Q. You served an apprenticeship?

A. Yes.

Q. And you are now a journeyman?

A. Yes.

Q. Are you a member of Local 367?

A. Yes, I am.

Q. Were you a member of that Local in the summer and fall months of 1951? A. Yes.

Q. And during the summer and fall months of 1951, did you have occasion to become employed as a plumber by the Haskell Plumbing and Heating Company? [148] A. I did.

Q. Will you state the circumstances, if you recall them, as to how you came to be employed by that organization?

A. The business agent notified that he wanted to see me and he told me——

Mr. Bell: I object to what he told you——

A. He gave me a dispatch.

Q. He gave you a dispatch. And to whom was that dispatch directed?

A. Haskell Plumbing and Heating.

Q. I'll hand you Plaintiff's Exhibit Number 2, and ask you if you can identify that slip?

A. That's a duplicate of the dispatch I took to King Salmon—Haskell.

Q. You had the original of that at one time in your possession? A. Yes.

Q. And what did you do with the original?

A. Gave it to the shop steward.

Q. And the shop steward was, who?



(Testimony of Lyle Wesley Franz.)

A. Michael Cullinane.

Q. You gave that to him at King Salmon?

A. Yes, I did.

Q. Now do you know whether you were working under the terms of a contract? [149]

A. Yes. We were working under a contract.

Q. And do you know what the contract reported—do you know the terms of the contract? Were you familiar with them?

A. Numerous ones, yes. Numerous terms in there.

Q. When you took the job under the terms of that contract, you knew what the conditions were?

A. That's true.

Q. In other words you were going to work? Now, when did you go over to King Salmon?

A. September 6, 1951.

Q. And how did you go over there?

A. Plane.

Q. And you took your personal property with you, is that correct? A. True.

Q. When you arrived at King Salmon, what happened?

A. I was met at the airport by the plumbing foreman, Tommy Mulcahy,—

Q. The plumbing foreman for who?

A. Haskell Plumbing and Heating.

Q. And you were met by him? A. Yes.

Q. Did he direct you in any manner to your barracks?

A. He took us to the barracks.

(Testimony of Lyle Wesley Franz.)

Q. He took you to the barracks. And what happened after you got to the barracks? [150]

A. Well I was assigned a bunk. I don't know whether I was assigned one or picked one out, and the following day went to work.

Q. All right with reference to the barracks, who furnished the barracks, if you know?

A. Haskell Plumbing and Heating.

Q. And did Haskell Plumbing and Heating also furnish your food? A. Yes.

Q. The following day you went to work in your capacity as a plumber? A. That's true.

Q. And you were paid for that work?

A. Yes.

Q. And you were paid by whom?

A. Haskell Plumbing and Heating.

Q. Following your—oh, just a moment. Back to the barracks again, did you, in addition to a bed in there, have storage space?

A. Yes, the person who had the bed before me built a wardrobe. So I had the wardrobe and floor space.

Q. What other facilities were in this barracks besides the bed and storage space?

A. There was a bathroom, hot water tank, and space heating stoves. [151]

Q. Space heating stoves. What type do you know?

A. Well the space heating type; I don't know the particular brand.

Q. Where were they located, do you know?

(Testimony of Lyle Wesley Franz.)

A. Well they was more or less equally distributed in the barracks. One on each end.

Q. One on each end.

A. Close to each end.

Q. And do you know—have any knowledge—as to what kind of fuel was used? A. Yes, I do.

Q. What kind of fuel was used?

A. Diesel fuel.

Q. Diesel fuel. Now calling your attention to October 11, 1951, did anything unusual happen that day?

A. Yes, that was the day of the fire. The barracks was burned up.

Q. How did you learn about the fire?

A. Well, we first seen the smoke and about that time the foreman run over with the—in the truck and said “jump in, our barracks is on fire.” And we went down to the fire and——

Q. How long did it take you to get back when you received that message?

A. Oh, I would say approximately ten minutes at the most.

Q. And when you got back what was the condition of the fire? [152]

A. It was raging.

Q. Was there any opportunity for you to enter the building? A. Impossible.

Q. The fire had advanced too far?

A. Yes.

Q. And after the fire had burned itself out, were you still there? A. Yes.

(Testimony of Lyle Wesley Franz.)

Q. And did you make any investigation as to the cause of the fire? A. No.

Q. Did you continue to work down there or did you return?

A. I returned to Anchorage.

Q. You returned to Anchorage. How soon afterwards?

A. The following day, we couldn't get out; we couldn't have a reservation on the plane until two days following the fire.

Q. Did you, after the fire was over, observe either of the two stoves? A. No, I did not.

Q. You stated in answer to one of my questions that they used Diesel fuel?

A. Yes. It was Diesel fuel with gasoline added to it.

Q. Diesel fuel with gasoline added to it?

A. Yes. [153]

Q. Don't they normally use what they call "fuel oil" in those kind of stoves?

A. Fuel oil and stove oil. Stove oil we should have had.

Q. And you state they were using diesel oil?

A. That's true.

Q. —to which they had added gasoline?

A. That's true.

Q. How do you know that?

A. I seen the bull cook, or whatever he was, put it in one day. He was filling the barrels. I went back to the barracks one afternoon, I run out of cigarettes, and went back to the barracks and he was

(Testimony of Lyle Wesley Franz.)

filling the tanks while I was there, and I stopped and talked to him and watched him fill the tanks.

Q. And what was he doing?

A. He was filling the tanks.

Q. And what was he putting in the tanks?

A. Well, he had a pump and he pumped in diesel oil, and then out of another barrel he pumped in gas.

Q. Did you call his attention to the feature of that?

A. Yes, and he said, "we are hoping this will stop the stoves carboning up like they have been carboning up."

Q. You called his attention to the fact that he was mixing gasoline with fuel oil? A. Yes.

Q. Now, I don't want you to tell me what he said. Did you go any further than that; did you point out anything to him?

A. Well, I pointed out it was a poor practice.

Q. For what reason?

A. Gasoline and fire doesn't mix too well. If they happen to not mix too well and had to settle, the gasoline would hit that stove straight. It is very possible it could cause an explosion.

Q. And I believe you said you called that to his attention——

Mr. Bell: Now, I object to leading the witness.

A. Yes, I called it to his attention.

The Court: Well, it is repetitious.

Mr. Bell: Very leading. It has all been asked and answered.

(Testimony of Lyle Wesley Franz.)

Q. And did he satisfy you that it was a safe practice?

Mr. Bell: I object to that. He is calling for a conclusion of a witness. "Whether he satisfied him."

Mr. Butcher: Well, I'll withdraw that question.

Q. Did you call it to any one else's attention?

A. Yes, I called it to the superintendent of Haskell Plumbing and Heating's attention.

Q. Who was he? A. Jules Ferer.

Q. Now, did you point out anything to him about that practice? [155]

A. Well, I told him I couldn't recommend that kind of practice.

Q. Now, don't say what he said, but so far as you know, did they change their procedure?

A. I don't believe so; I don't know.

Q. Now, did you tell any one else besides Jules Ferer?

A. Yes, I told the shop steward.

Q. And who was the shop steward?

A. Michael Cullinane.

Q. Michael Cullinane. You know you told him? And do you recalling telling anybody else?

A. Well, it caused quite a discussion, and I guess I told everybody.

Q. You recall talking it over with your fellow employees; is that correct? A. Yes.

Q. Now, during all the time that you were at King Salmon employed by the Haskell Plumbing

(Testimony of Lyle Wesley Franz.)

and Heating Company, you received a salary for your work?       A. Yes.

Q. And who paid you that salary?

A. Haskell Plumbing and Heating Company.

Mr. Butcher: I think that's all.

The Court: You may cross-examine. [156]

### Cross-Examination

Questions by attorney for defense:

Q. How old are you Mr. Franz?

A. 37.

Q. What?       A. 37.

Q. And you've been a member of the Plumbers' Union 20 years?

A. I didn't say that, sir.

Q. Well, you've been a journeyman plumber 20 years, you said.

A. I've been at the plumbing business possibly 20 years.

Q. Did you ever work at anything else in your life?

A. Yes. Off and on in between, yes.

Q. Where do you live now?

A. Westward Hotel in Anchorage.

Q. You are stopping here now?

A. That's right.

Q. Where is your home?

A. Wherever I stop, sir.

Q. Where did you leave to come here—from?

A. I happened to be in Seattle, Washington, at that time.

(Testimony of Lyle Wesley Franz.)

Q. Had you been working in Seattle for the last two months? A. No.

Q. What were you doing there? [157]

A. I just arrived at Seattle about a week previously from Haines, Alaska.

Q. Haines. You had been at Haines, Alaska?

A. Yes.

Q. Then you went to Seattle? A. Yes.

Q. Then you came back here and you are stopping at the Westward Hotel for this trial?

A. Yes.

Q. Now did you ever see the contract between the Plumbers Union and Haskell—F. W. Haskell. Wait a moment, I'll give you the name. F. M. Haskell. Did you ever see that contract?

The Court: The contract, I think, is Haskell Plumbing and Heating, signed by F. M. Haskell.

Mr. Bell: F. M. Haskell Plumbing and Heating Company, and operated by F. M. Haskell. (looking at paper)

The Court: Yes.

Mr. Bell: That's why I kept this.

The Court: But you asked him if it was a contract with F. M. Haskell rather than the company.

Mr. Bell: F. M. Haskell Company, by F. M. Haskell. Did you ever see that contract before today? A. Yes.

Q. Where did you see it? [158]

A. Well, I seen that contract about the time it was being signed or shortly after.

Q. Who——



(Testimony of Lyle Wesley Franz.)

A. And I've seen many copies of it.

Q. Who else signed this contract?

A. Sam Ogle, a representative of our Local Union.

Q. And did you know anything about the terms of that contract?      A. Yes.

Q. Were you on the board that made the agreement?      A. No.

Q. Then you don't know when it was executed, do you?

A. Not the exact date. I read it many times.

Q. Have you got a copy of it?

A. Yes, I have.

Q. With you?      A. No.

Q. Where is it?

A. I think you'll find it in my hotel room, sir.

Q. No, I'm asking you. Is it there?

A. I believe so unless it has been misplaced.

Q. Well, did you bring it here with you?

A. Why—a-h—there are numerous articles. I can't—

Q. What?

A. There are numerous things that I don't look at every day [159] and I lose half of them in the shop.

Q. You don't know whether you brought it here with you or not?      A. No, I don't.

Q. Was the one you have signed?

A. No, it isn't. It's a blank.

Q. So, as far as you know there's no—well

(Testimony of Lyle Wesley Franz.)

whose name is mentioned in the head of the contract that you have?

Mr. Butcher: Now, Your Honor, I object. The contract speaks for itself. The witness has stated that he knew some of the conditions, he didn't state that he knew them all.

The Court: Well, he is testing his memory as to whether he knows the contents of the contract or some of its terms, and it is therefore permissible cross-examination.

Mr. Butcher: Well, it is all right, Your Honor, to ask him some of the terms, but he is asking whose name appears at the top of the contract——

The Court: Well——

Q. (By defense attorney): Who is the contract headed by; what company's name is at the head of it, if you know?

Mr. Butcher: I object on the grounds that it is improper cross-examination.

The Court: Well I think it——

Mr. Bell: (interposing) I've done it many times—— [160]

The Court: It is proper cross-examination, although the Court would not be too much impressed if he didn't know the name of it. This long name of this employers' association. You may answer, although it is rather immaterial to me.

A. Well the name of the contractors—I mean that's something you always skip over, just like the small print and everything else; you just skip over

(Testimony of Lyle Wesley Franz.)

it; the formalities and preliminaries. But it represents the Plumbing Contractors and Local 367.

Q. (By attorney for defense): Did you know that the Haskell Plumbing and Heating Company's name was not mentioned in the contract, at all?

A. It is a plumbing association which includes all contractors.

Q. You understood, then, that the Haskell Plumbing and Heating Company's name was not mentioned in the contract any place?

The Court: Well that—certainly the Court will sustain an objection to it because the contract itself is to the contrary. It is expressly signed by Haskell Plumbing and Heating Company, by F. M. Haskell.

Mr. Bell: —the name.

The Court: Your question was—"Did you know the name doesn't appear at all?" and that is not the fact, Mr. Bell. [161] The name does appear, if you will examine the last page.

Mr. Bell: No, sir, the name is not on the face——

The Court: I beg your pardon; it is on the last page.

Mr. Bell: It is not in the context of the contract at all.

The Court: You didn't say that. You said: "Did you know that it doesn't appear at all?" and that is not correct. The question is improper.

Mr. Bell: Let me ask it again. Did you know that the Haskell Plumbing and Heating Company's

(Testimony of Lyle Wesley Franz.)

name did not appear in the body of the contract anywhere? You read it many times, you said?

Witness: Yes.

Q. (By attorney for defense): Now, did you know that the name Haskell Plumbing Company nowhere appeared in the body of the contract?

A. There is no individual plumbing contractor's name listed in the body. It is the signature at the end that counts.

Q. And that's all then. Do you know who signed it at the bottom? A. Yes.

Q. Were you there when they signed it?

A. Well, I don't believe it would support me.

Q. Are you a married man? A. No. [162]

Q. Where were you at the time you started to go to work for the—on this job? Where did you hire at—where were you hired from?

A. Anchorage.

Q. Had you been here for some time?

A. Yes.

Q. Where did you eat over there?

A. I ate in the messhall, furnished at the camp site.

Q. It was some hundred yards or more from where you slept; was it not?

A. Approximately.

Q. And that was being furnished by the Gaasland Construction Company; was it?

A. My room and board was furnished by Haskell Plumbing and Heating.

(Testimony of Lyle Wesley Franz.)

Q. Well, you mean it was paid for by them, do you?

Mr. Butcher: Now, Your Honor, I object——

Mr. Bell: Let him answer, please.

The Court: Oh, I think that is proper cross-examination. He may answer. And it is material.

Q. (By attorney for defense): You mean Haskell Plumbing and Heating Company was paying for your board?

A. According to their contract, they had to pay for it or trade for it in some fashion.

Q. Now, you ate then there where the other people ate at [163] the regular dining room or messhall? A. That's true.

Q. Now who was this fellow that you saw mixing this gasoline and oil?

A. I do not know.

Q. What kind of a looking fellow was he?

A. Oh, that's been sometime ago, I wouldn't attempt to describe him.

Q. Well, was it a man or a woman?

A. It was a man.

Q. How old? Would you say?

A. I never looked that closely at the man.

Q. Was he gray-haired or was he a young man?

A. I didn't look that closely at the man.

Q. Well, would you say he was twenty or fifty years old?

A. Possibly somewhere in between one of those, or maybe——

(Testimony of Lyle Wesley Franz.)

Q. Maybe under or over? A. Could be.

Q. Yes. And why didn't you tell your counsel about the seeing of the mixing of this stuff before today? A. I did.

Q. Did you answer a set of interrogatories?

Mr. Butcher: Now, Your Honor, I object. This man did answer it in the interrogatories. It has been available to Counsel—— [164]

Q. Let me see the interrogatories. I haven't got a copy of the answers.

The Court: Very well, we shall have a look. It may be used for this purpose. Let's see.

Mr. Butcher: The last answer, Your Honor——

The Court: The last interrogatory. (The Court looks through a file.) Yes he made it, and I'll call attention to question 51.

(Mr. Bell took the file.)

Mr. Bell: I will bring it back to you.

Q. (Attorney for the defense): Now, I will ask you how you knew that they were using diesel oil instead of stove oil, as you stated in interrogatory number 51? A. I seen it.

Q. And you can tell the difference by looking at oil whether it is diesel oil or stove oil?

A. It was stamped on the barrel "Diesel Oil."

Q. Well, you've seen oil delivered in barrels stamped "gasoline" too, haven't you? When it wasn't gasoline? A. No, I haven't.

Q. You never did see that? Now, how do you know it was gasoline that he put in it?

(Testimony of Lyle Wesley Franz.)

A. Well, I could see the gasoline being pumped in there.

Q. And how much gasoline did he put in?

A. He said he was going to try and put in about 5 gallons. [165]

Q. And how many gallons of Diesel oil did he put in?

A. It was a 55 gallon barrel; probably 50 gallons.

Q. And he told you he was going to put 5 gallons of gasoline in it?      A. Yes.

Q. Now what date was it that you saw him doing this?

The Court: Just one thing there, Mr. Franz. Instead of nodding your head, would you give an audible answer because sometimes the reporter doesn't catch that.

A. Certainly.

Q. Now, what day was it you went after the cigarettes?

A. I would say the first part of August—the first part of October. Pardon me.

Q. And they had a 50 gallon barrel at the time there, and connected to the stoves, did they?

A. Yes.

Q. And this man was filling that 50 gallon barrel?

A. There was more than one 50 gallon barrel on the stand. I forget, I believe there was three.

Q. And were they all fastened together or not?

A. Yes. They was hooked up together.

(Testimony of Lyle Wesley Franz.)

Q. Do you know who that fellow was that you saw around the place. You don't know what his name was—— A. No——

Q. Do you know any connection he had there?

A. No, I don't.

Q. Had you ever seen him before? A. No.

Q. Had you ever seen him around the cooking place—or the eating place?

A. Not that I remember of.

Q. You just happened to see him that one time there? A. That's true.

Q. Now what—Excuse me, Your Honor, I will pass this right back. (Gave file to Court.)

The Court: You may keep it if you wish.

Mr. Bell: No, thank you.

Q. (By attorney for defense): When you ate there, you ate with about a hundred or a hundred and fifty people there, did you not?

A. Possibly. I suppose, yes.

Q. After you saw this then, you went right on staying in the place; after you knew this was a dangerous process, you went right on staying there, did you? A. Yes.

Q. And you told the job steward, and you told other people about this dangerous system, did you?

A. Yes.

Q. And then you kept right on staying?

A. Yes. [167]

Q. You knew it was very dangerous, didn't you? To mix gasoline with oil and for a stove?

A. Yes.



(Testimony of Lyle Wesley Franz.)

Q. You knew it was very dangerous, didn't you?

A. Yes.

Q. And you went on and stayed just the same?

A. Yes.

Q. Where did you stay after the fire?

A. We moved into another barracks.

Q. Where was the other barracks?

A. Well, in the same area.

Q. There was a lot of barracks there, were there not?

A. True.

Q. And did you know the Gaasland people—Gaasland Construction Company?

A. Not personally. No.

Q. You knew they were the general contractors on the job?

A. Yes.

Q. And of course when that barracks burned, they took you to some place else to stay, did they?

A. Yes.

Q. Was it a similar barracks?

A. Somewhat similar.

Q. Now, why do you say this was a bull cook that you saw mixing that? [168]

A. I don't recall saying he was a bull cook. I said he could have been a bull cook. I do not know what he was.

Q. You don't know whether he was a bull cook or not?

A. No, I don't.

Q. I see. You say you went after these cigarettes about October first?

A. The first part of October, yes.

Mr. Bell: All right, that's all.

(Testimony of Lyle Wesley Franz.)

The Court: May I ask a question. Do you know, Mr. Franz, just what is the function of a bull cook?

A. Well, they ordinarily make beds and do janitor work.

The Court: So they are not cooks?

A. Oh, no.

The Court: That is what I had in mind.

A. Not in my opinion.

The Court: They are sort of a steward, in a way?

A. They could be.

### Redirect Examination

By attorney for the plaintiff:

Q. Mr. Franz, in your conversation with the bull cook, after you called his attention, as you said, to the fact of this dangerous practice, did he satisfy you that it was not? A. No. [169]

Q. Did he make any statement to you that it was not dangerous?

A. They was working on a theory, to my way of understanding it, to see whether it would work.

Q. Who was working that out?

A. I don't know who he was working for. If he was working for Haskell or Gaasland. I don't know who he was working for. I don't know.

Q. Did you have enough conversation with him to ascertain whether he was doing it on his own volition or under——?

A. No. It was my understanding he had been told to do that.

(Testimony of Lyle Wesley Franz.)

Q. And you gleamed that from your conversation?      A. Yes.

Q. And when you talked to the superintendent, did the superintendent satisfy your fears about it?

A. He said he would see what he could do about it.

Q. And on that assurance you went back and stayed in the barracks?      A. That's right.

Q. Now, calling your attention to the question Mr. Bell put to you, as to whether under the terms of the contract the Haskell Plumbing and Heating had agreed to pay for your board and room, you stated "yes" to that, did you not?

A. Yes.

Q. Now, I want to call your attention to paragraph 6 on [170] page 5 and ask you to read that paragraph. Read it carefully.

(The witness complied with the request of counsel.)

Is that paragraph, which provides that Haskell Plumbing and Heating Company agree to pay for your board and room?

A. They agree to furnish the board and room.

Q. They agree to furnish. Now is that what they agreed to under the terms of this contract?

A. That's true.

Q. Is that your testimony, now?      A. Yes.

Q. When you stated that they agreed to pay for it, that was not correct?

Mr. Bell: I object to leading this witness. He is a very intelligent person and——

The Court: Well, the question is answered.

Mr. Butcher: I'm sorry.

The Court: Yes. It was rather leading—but rather harmless.

Any further questions, Counsel?

Mr. Bell: Nothing on my part.

The Court: That is all then, Mr. Franz.

Now, I expect that that should conclude our work for the day. We will resume this tomorrow morning, and try to make some disposition. It is quite likely that we would not conclude this matter by noon tomorrow, and it may be that we [171] would have to interrupt for parties that are to be here from Seward, that we may have to hear for a couple of hours, and then an injunction matter at three. So we will see how it develops. I am sure we can work through the morning anyhow.

Mr. Butcher: Well, if it will help, Your Honor, I have two more witnesses—the plaintiffs themselves—and I may call one other witness very shortly to establish a disputed point, and that will be about my case as far as direct evidence is concerned.

The Court: We will resume then at 9:30 o'clock in the morning and adjourn court until the same time.

The court adjourned at 4:50 p.m.

(At 9:30 a.m., the following day, January 6, 1955 the case of Weeks vs. Haskell continued in session.)

The Court: We will continue with the trial this

morning in the case of Weeks vs. Haskell Plumbing and Heating Company. The plaintiffs may call their next witness.

Mr. Butcher: Call Mr. Cullinane.

### MICHAEL CULLINANE

was then called as a witness in his own behalf, was duly sworn and testified as follows:

#### Direct Examination

By attorney for the plaintiffs: [172]

Q. Will you please state your full name?

A. Michael Emmett Cullinane.

Q. Are you the Mike Cullinane that is a party in action A-7736 against Haskell Plumbing and Heating?

A. I am.

Q. And what is your occupation, Mr. Cullinane?

A. I am a steamfitter.

Q. And how long have you been a steamfitter?

A. I finished my steamfitter's apprentice course in 1948.

Q. And you have been doing that type of work since that time?

A. Yes, I have.

Q. Are you a member of the Plumbers and Steamfitters Local number 367?

A. I am.

Q. That's the Anchorage Local?

A. That's right.

Q. And where does it normally cover? Jurisdiction over?

A. In the Anchorage area, and outlying limits. The parallels and whatnot, I am not sure of. But

(Testimony of Michael Cullinane.)

they do have jurisdiction of the King Salmon area.

Q. Were you a member of that Local 367 in the summer and fall months of 1951?

A. I was.

Q. And were you, at one time or another, during those months, [173] dispatched by your Union to work for Haskell Plumbing and Heating?

A. Yes, I was.

(Mr. Butcher to Clerk) May I have the dispatch slip there? (It was handed to him.)

Q. I hand you Plaintiff's Exhibit number 2, and ask you if you can identify that? Statement?

A. Yes, I can.

Q. What is it?

A. This is my dispatch slip—a duplicate of my dispatch slip—that was made out to go to the Haskell Plumbing and Heating job at King Salmon.

Q. And where is the original of that slip, if you know?

A. The original of that slip was burned up in the fire in October of '51 at King Salmon.

Q. Were other slips covering other plumbers turned over to you at that job?

A. Yes, they were.

Q. Were you what is known as the job steward?

A. At the time of the fire I was the job steward, yes.

Q. At least sometime while you were working for the Haskell Plumbing and Heating Company, you were the job steward? A. That's correct.

Q. And previous witnesses have testified, upon

(Testimony of Michael Cullinane.)

their arrival at King Salmon, *they* they turned over to you their dispatch slips? [174]

A. That's right.

Q. That is right. And those dispatch slips were kept by you and were destroyed later?

A. Destroyed in the fire, later.

Q. Now, when did you hire out for Haskell Plumbing and Heating—when were you dispatched over there?

A. July 15, of 1951.

Q. And did you go immediately over there?

A. Whether I left on the plane the 15th or 16th, I'm not sure, but I left within a day or so; whenever the airlines made a reservation and the plane was going out and whatnot. I was the——

Q. What airlines did you go on?

A. I went from Anchorage to King Salmon on Northern Consolidated Airlines.

Q. And was your transportation arranged for?

A. It was taken care of by the Union.

Q. It was taken care of by the Union?

A. We went down and picked up the tickets—ticket at Northern Consolidated Airlines, and reservation and whatnot and traveled from there.

Q. The reservation and those arrangements were made for you by the Union. Is that right?

A. That's right. [175]

Q. And you took your gear with you?

A. Right.

Q. Now, when you got over there, what did you do?

(Testimony of Michael Cullinane.)

A. Well, we were met at the airport by a Mr. Mulcahy who was the Plumbing foreman for Haskell Plumbing and Heating——

Q. And Mr. Mulcahy is also a party to the suit?

A. That's correct. And he took us to the quarters—our barracks, which Haskell Plumbing and Heating had for their plumbers and steamfitters, and there was a bed made up and we unloaded some of our gear and unpacked some of our work clothes for the next day's work.

Q. And then, from that time on until October 11th, you say that you worked steadily for Haskell Plumbing and Heating Company?

A. That is correct.

Q. And who paid your wages to you?

A. Haskell Plumbing and Heating Company.

Q. And was food provided for you—your meals?

A. Our food and lodging was furnished by Haskell Plumbing and Heating Company; that's right.

Q. Was there, if you know,—were you working under any kind of an agreement which provided for this?

A. Yes, we were working under the present agreement—I mean an agreement which was signed for that year between Haskell Plumbing and Heating and the Local Plumbers and Steamfitters [176] of Anchorage.

Q. And are you acquainted with that contract; do you know its terms?

A. Yes, I had a blank copy of that contract in-



(Testimony of Michael Cullinane.)

asmuch as I was the steward for reference and whatnot.

Q. So you are familiar with it? A. Yes.

Q. All right now. Are you acquainted with a man by the name of Ben Holbrook?

A. Yes, I am.

Q. And is that the same Ben Holbrook who is a party to this action? A. That's correct.

Q. Was he employed on the same job as you were at King Salmon? A. Yes, he was.

Q. And did he work at that job?

A. Yes, he was on the job.

Q. Do you know, of your own knowledge, whether he was there on October 11th in the capacity of an employee of Haskell Plumbing and Heating Company? A. Yes, I do.

Q. As job steward, you would know that?

A. That is correct.

Q. Where was Mr. Ben Holbrook quartered?

A. Mr. Holbrook was quartered in the same building that we lived in at King Salmon.

Q. Under the same arrangements as you were?

A. That's right.

Q. Will you tell us what happened on October 11th, if you can?

A. Well, we went to work in the morning and returned to the barracks at lunch hour, and returned back to work after lunch; and in the early afternoon—a very short time after we left the barracks, our foreman, Mr. Mulcahy, of Haskell Plumbing and Heating, come around to the power

(Testimony of Michael Cullinane.)

house where I was working and informed us that the barracks was on fire. So we all returned to the barracks to see if there was anything we could possibly do, and when we arrived back at the camp site where the barracks was located, we seen that the barracks was nothing but a flaming mass of flames coming out from the roof and both ends and the sides, and one couldn't enter or attempt to enter or anything of that nature; so we just watched it burn, and that was about it. You couldn't enter it or do anything about it.

Q. You had no opportunity to save any of your personal property?

A. There was no possible chance of entering the building, no.

Q. Now, will you describe the interior of that building? A. Previous to the fire?

Q. Right. [178]

A. Why it was a—a Quon-set hut with two space heaters, one on each end, and toilet facilities in one section, and the rest was beds with tables between beds and home-made closets, and a shelf over every bed for hanging your clothes and whatnot.

Q. Can you describe the space heaters?

A. Why they were typical home-type space heaters, carburetor fed, float operated and no motors or anything of that nature on each one.

Q. Where were they fed from, if you know?

A. They were fed from outside barrels—from drums which were all hooked together outside the barracks.

(Testimony of Michael Cullinane.)

Q. And can you describe—do you know the name or type of space heater—the manufacturer?

A. No, I do not know the name of that.

Q. You had seen that type before?

A. Yes, I have.

Q. You are familiar with them? A. Yes.

Q. Are they frequently used in camps? For that purpose? A. Yes, they are.

Q. Now, from your own knowledge, what you know yourself, do you know what caused this explosion? If you don't know don't answer, but if you know what caused it, say so.

A. Well I believe that it was—— [179]

Mr. Bell: I object to what he believes.

The Court: Your opinion would not be permissible, at least at this time—what you know.

Q. (By attorney for plaintiff): If you know. If you don't, don't say anything.

A. Well, I don't know.

Q. You didn't make any personal investigation of the interior of that building after the fire?

A. No.

Q. Now you heard Mr. Franz testify yesterday that he mentioned to you that the bull cook was mixing gasoline and Diesel oil and putting it into barrels to be used as fuel for the stoves. Did you hear him so testify? A. Yes, I did.

Q. And did he so mention that fact to you?

A. Yes, he did.

Q. Did you mention that to anyone else?

A. Yes, as job steward I mentioned it to Mr.

(Testimony of Michael Cullinane.)

Cross Examination

By attorney for defense:

Q. Is that Mr. Cul-lain?

A. Cullinane. [182]

Q. What is your real name; Mike is a nickname, is it?

A. Michael Emmett Cullinane is my full name.

Q. I didn't understand you?

A. Michael Emmett Cullinane.

Q. Thank you.

Mr. Butcher: (interposing) Your Honor, may I ask for a half minute? A man whom I must see for just one word walked in. May I have your indulgence? (to Mr. Bell)

Mr. Bell: Sure, go ahead.

(Mr. Butcher returned directly.)

Q. How long were you over there altogether?

A. I arrived in King Salmon approximately the 15th of July, and we left King Salmon two or three days after the fire.

Q. Did you work any more after the fire?

A. Yes, we did.

Q. Now, where did you stay after the fire?

A. In one of the other buildings in the camp site.

Q. About how many of those Quon-set huts and buildings were there?

A. I don't understand the question——

Q. Well, maybe I didn't make it clear, Mr. Cullinane: Were there a large number of those Quon-set huts there on the grounds at the place?

(Testimony of Michael Cullinane.)

A. There were several Quon-sets and various types of camp buildings there. [183]

Q. Approximately how many? Would you say?

A. Well approximately, I'd say fifteen. I am not sure whether there was more or less.

Q. Were they all equipped about the same way?

A. No, they were not.

Q. How were the others equipped?

A. Well, the others were equipped with just plain space heaters and beds, and shelves over every one of the specific huts and Quon-set huts, but that was all. There was no inside plumbing facilities in each quarters.

Q. But outside of the inside plumbing heating—or plumbing equipment, they were about the same, were they? A. More or less.

Q. They had those space heaters in them, too, did they? A. That is correct.

Q. Is that space heater one that has an air chamber between the outer portions of it and the part where the fire is? A. That's right.

Q. Some people would say air would circulate in at the bottom and out at the top, or something like that, do they? It don't have a fan but it just circulates?

A. I believe that's the theory of it.

Q. Now, on this particular day, what time did you quit work at noon? To go to lunch? [184]

A. Well, under the contract that we work under, to which the out-of-town section applies, we leave

(Testimony of Michael Cullinane.)

the job site in order to be in camp at the time dinner is served.

Q. At twelve o'clock?

A. By twelve o'clock—or if the chow hour is twelve o'clock. I don't recall quite whether it was a quarter to twelve or ten of twelve, but it was—we leave the job site to be in camp by dinner time.

Q. And then you go from there directly to the mess house—or messhall, is it?

A. No, we'd usually go to our quarters and wash our hands, and go over and take our coats off. We usually have a couple of jackets on or something—dirty clothing—then go to the messhall.

Q. Now, when you get over to the messhall, you all eat in the same room—the employees that were working under you, the camp steward, and the others—the multitude of the other employees—they ate in the same place?

A. That is correct.

Q. Then, after you ate your lunch that particular day, I believe you said you returned to the quarters, again?      A. That's right.

Q. And do you know how long you stayed there, at the quarters when you returned?

A. On the King Salmon job, we took a hour for lunch, so [185] at the end of the hour, from the time that we arrived back in camp, why we would leave to go back to work. Now, whether it was one o'clock, or ten minutes to one, or five after, I do not know.

Q. And after you did leave you got in cars and

(Testimony of Michael Cullinane.)

drove to the place where you were going to work again?

A. No, we got in the company truck and were driven back to the job site.

Q. Well, company truck. It was a truck and not a car, I mean? A. Right.

Q. Un-huh. Now when you got there, you testified a few moments ago that you had just gotten back and had been there a very short time when the superintendent called you—or foreman, and told you that the barracks were on fire. Is that right? Who did really call you?

A. Mr. Mulcahy who was plumbing foreman for Haskell Plumbing and Heating.

Q. And he's the one called you?

A. That is correct.

Q. And was it just a few moments from the time you got back to the job that he called you and said the barracks was on fire?

A. No, it was half an hour to an hour, as I recall, now; I'm not sure. No one looked at their watch, I don't believe. [186]

Q. Well, wasn't the barracks completely burned down at two o'clock? Completely burned and destroyed by two o'clock?

A. Well, I don't recall. This was four years ago, and the exact time I wouldn't know, but it was in the early afternoon.

Q. You think it was four years ago?

A. I believe it was October 11th, 1951.

Q. That wouldn't quite be four years; that's

(Testimony of Michael Cullinane.)

what I was calling your attention to. Now, when you mentioned this bull cook having been seen mixing gasoline and the oil, did you mention that to Jules somebody, did you say?

A. I didn't mention the bull cook and the oil to Mr. Jules Ferer as having seen it. I mentioned that Mr. Franz had seen this bull cook mixing this oil and gasoline, and reported the incident to Jules to have him do something about it.

Q. Now he was in what capacity there?

A. Why he was the head man—the superintendent—for Haskell Plumbing and Heating.

Q. Well did he have anything to do with anything but the plumbing?

A. I wouldn't know. That's the capacity we were in—plumbers and fitters, and what else, I do not know.

Q. Well he was the superintendent on the works, was he not? [187]

A. I don't know. He was the superintendent on the plumbing and heating.

Q. Well, he was general superintendent over everything there, was he not?

A. No. He wasn't.

Q. Who was the general superintendent, then?

A. As far as I know, the general superintendent of Gaasland Construction Company was a gentleman that died a year or so after that.

Q. Do you remember his name?

A. I recall his first name and I believe it was



(Testimony of Michael Cullinane.)

"Pete." And may have been Jensen, but I am not sure of that.

Q. All right. Now was—you didn't mention this to Jensen, did you?

A. We don't have anything to do with those people. I mean we are——

Q. But did you?           A. No.

Q. Un-huh. Now, about what date was it that you mentioned this to this fellow "Jules"?

A. It was right after Mr. Franz reported it, which was around the first of October, as I recall.

Q. Did you ever mention it to him any more after that?

A. No, this Mr. Ferer was a very competent man, to say the least, and when he'd say he'd take care of something, why [188] that was all there was to it.

Q. Then, you are an expert, actually; being a steamfitter and plumber on the handling of connections of all kinds to stoves and plumbing and plumbing equipment, aren't you?

A. I wouldn't say I am an expert. I'd say I connected a lot of connections in regards to pipe work in the steamfitting industry.

Q. Did you ever look to see about the connections to these stoves?

A. Not particularly.

Q. The day that you were in there, and had left, just before this fire, did you see anything different around the place?

(Testimony of Michael Cullinane.)

A. I don't recall having seen anything different.  
No.

Q. Were the stoves working all right, so far as you know?

A. I believe they were working quite efficiently.

Q. Now, do you know, of your own personal knowledge, whether there was any further reports about this oil having gasoline in it?

A. No, I do not.

Q. Do you know of any one seeing any person doing that after that date? Did you know of any one who did see them do it after the date that the witness testified to yesterday?

A. No, I do not.

Q. Now this happened ten or eleven days, possibly, after you [189] saw this scene, did it not?

A. That's right.

Q. You remained at the place after you had knowledge of this, did you?

A. That's correct.

Q. Did you ever eat any place over there, other than at the regular messhall?

A. Do you mean that I paid for—or the company furnished?

Q. Well, did you ever, at any time—and then I'll ask you did the company furnish? Did you ever at any time?

A. I believe I had a meal or two down at Sky-motel cafe which we paid for out of our own pocket inasmuch as we had missed regular camp chow—for being late; or we wanted something special.

(Testimony of Michael Cullinane.)

Q. And the food then was put up by the general contractor and served to all of the people that were working there. Was it?

A. I don't know. We ate in their messhall. Who the caterers were, or who they worked for, I don't know.

Q. I believe you said that you understood the terms of the contract, in that the food was paid for by your employer, the Haskell Plumbing and Heating Company. Is that right?

A. I do not know. We don't pay for it, and how they paid for it or any of those arrangements, I don't know. I know that we didn't pay for it as individuals. [190]

Q. Did you know the bull cook there?

A. No, I didn't.

Q. Your sheets and bedding was changed, your beds were kept clean by someone?

A. That's right.

Q. Did you ever see the man that changed the sheets or bedding?

A. No, I didn't; when he was working, we were working out on the job site, and in that way missed each other.

Q. Well, did you know that he worked also in the messhall?

A. I can't answer that. I can't recall if the bull cook was one of the waiters or cooks or what. I don't know.

Q. Would you know him if he was here in the courtroom?

(Testimony of Michael Cullinane.)

A. I believe I would, but I'm not sure.

Q. Do you remember ever seeing him anywhere?

A. I can't recall having seen him since leaving King Salmon.

Q. Well, I mean at King Salmon; do you remember having seen him there?

A. Well I must have seen him; I mean a hundred or a hundred and fifty men in the camp, you're bound to see everybody eventually, but I cannot recall having seen him.

Q. You were there quite a number of months?

A. I was there from July 'til October, yes.

Q. And you didn't see him then mixing any gasoline and oil? [191]

A. No, I did not.

Q. Or rendering any services there?

A. No.

Mr. Bell: I think that's all.

The Court: Any redirect?

Mr. Butcher: No, Your Honor.

#### Examination by the Court

Q. Do you know whose duty it was—in your lodgings furnished in this manner to which you testified to—to light the fires—or to maintain the fires and stoves?

A. It's the usual duties, as we'd say, of the bull cook; the janitor—the man that sweeps up and cleans up—and takes care of all those things.

Q. That is the usual practice; that is included in the bull cook's duties?

A. Well, yes. Now, in relation to your fires in

(Testimony of Michael Cullinane.)

the fall in your camps, why the stoves are usually going all the time, and usually on filling your oil tanks and duties of that kind why when there's a camp that's spread out why they have a gang or detail that takes care of fueling the tanks and that sort of thing.

Q. Do you recall, then, whether in October at King Salmon, it was necessary to keep fires burning at that time?

A. I am quite sure that it was because we were wearing [192] three or four layers of clothes, you would say. That is long underwear and wool pants and shorts, plus our overalls and a work jacket which when the temperature was down—I don't know, maybe it was ten above or maybe it was zero. It was necessary to keep the fires going at all times in such weather.

The Court: If that opens up any further inquiries, counsel may examine.

Mr. Bell: Yes.

### Recross Examination

Questions by attorney for defendant:

Q. Do you know whether you, or any of the men living in the room with you could, if you wanted to, regulate the amount of the heat from that stove. If you could do it?      A. No, I don't, actually.

Q. Well, isn't there some kind of a valve on the stove where you can give it more oil or less oil if you want to?

A. Yes, I am quite sure there was.

(Testimony of Michael Cullinane.)

Q. And can you ever remember it being too warm in there, at any time?

A. No, I can't at King Salmon; I can't recall it being too warm in the fall.

Q. Do you remember ever having it too cold and having to turn it up to get more heat?

A. Well as I recall, they were going full force all the [193] time to keep it as warm as possible, and inasmuch as there was quite a bit of open space underneath that created quite a draft on the quarters.

Q. There were just two of those heaters there?

A. As I recall there was one at each end of the hut, plus a water heater in the toilet room.

Q. Well, wasn't there another heater that wasn't in use; another space heater in the Quon-set hut that was not in use at the time?

A. There may have been, but I don't recall at this time.

Mr. Bell: I see. That's all.

Mr. Butcher: Your Honor, my next witness has obtained some photographs and I haven't had a chance to look at them; may I have a moment?

The Court: Indeed you may. I would like before you do that, counsel,—just a moment here—to recall Mr. Judson for a question which the Court would like to ask, if he is present.

Mr. Butcher: Yes.

## THOMAS B. JUDSON

resumed the witness stand.

## Examination by the Court—(Continued)

The Court: Now counsel may object to this question if you believe it improper, but Mr. Judson, you testified yesterday something to the effect that after this fire that you saw the shell of one of these heaters—stoves, that was split open. I wonder if you could describe that a little more fully to [194] the Court so that we could get that picture a little clearer. Just what the condition was of that heater when you saw it? This I understand was after the fire.

A. (Witness nodded in the affirmative.)

Mr. Butcher: Answer audibly.

A. Yes.

Mr. Butcher: Don't shake your head.

A. Well, I don't have a clear picture of it. As I remember there was a drum laying over there that was split open, with steel and everything laying there.

Q. A drum?

A. It looked like the drum of a heater; yes.

Q. Was this heater of a drum type or erect type such as is used in households?

A. I would say, as I remember the heater—it was a space heater—regular oil stove with a drum casing.

Q. It had a drum casing. Are you familiar with the type that is used in households generally that

(Testimony of Thomas B. Judson.)

has a cabinet shape, and then it has a fire pot, and above that an air space. Was it that type?

A. That was the type. There was absolutely no opening—fan on it or anything else. It was just ordinary.

Q. But the cabinet part of the heater was shaped like a drum?

A. The internal part of it was shaped like a drum, but it was a square. [195]

Q. Oh, the internal part. Yes; the inside of the cabinet, that which contains the heat is a drum shape; is that it? A. That's right.

Q. And that you say you saw lying to one side?

A. As I recall it, yes.

Q. And split open? A. Yes.

Q. What about the other stove; did you notice it?

A. No, I didn't go any farther when I saw——

The Court: Well, thank you. That clarifies the matter.

Mr. Bell: Your Honor, may I ask him another question?

The Court: Yes, you may.

### Recross Examination—(Continued)

By Attorney for Defendant:

Q. Had you observed those stoves inside of the outer wall of the stove, prior to the fire?

A. I don't understand your question.

Q. Had you ever looked inside of the outer cover



(Testimony of Thomas B. Judson.)

of this stove, prior to the day the fire took place—before?

A. Well, there was a mesh-lining on the stove; naturally I could see the internal part of it when you'd stand up there and warm your hands, and put your gloves on there once in a while to warm them up a little bit. [196]

Q. And on this particular occasion, you saw something that could have been a part of that stove—afterwards—in your opinion?

A. That's correct.

Q. Now, where was it with relation to where it had been sitting?

A. Well, it was from the front of the barracks—to the left—laying down.

Q. Was that a heavy iron thing—or tin—or metal—sheet metal?

A. Well, as I recall it—it just looked like a drum laying there.

Q. Well, was there any drums—like gasoline drums or anything, inside of the quarters before the fire, that you noticed?

A. Well, I guess not; maybe a trash barrel or something like that.

Q. Trash barrel. And they were made of drums, too, weren't they?      A. I reckon so.

Q. Could that, in your opinion, Mr. Judson, been one of those barrels that had formerly contained trash?

A. I guess it might have been.

Q. Did you notice on the day of the fire, when

(Testimony of Thomas B. Judson.)

you were there at noon, whether there was trash in those trash barrels or not? [197]

A. No, I couldn't.

Q. If a cigarette had been thrown in the trash barrels could that have caused the fire, in your opinion?

A. I suppose it could in your opinion; yes.

Mr. Butcher: I call Your Honor's attention to the fact that this witness hasn't answered that question except to say in Mr. Bell's opinion.

The Court: Well, yes. I heard.

Q. Now you—I didn't ask you for my opinion. I wanted to ask you for yours—(laughter). You think it could have happened—a thing like that, don't you? You didn't speak audible so she could get your answer.

Reporter: What is your answer—"Yes"?

Witness: Yes. (Waves hand a little to indicate indecision.)

Mr. Bell: That's all.

#### Redirect Examination

Questions by Attorney for Plaintiffs:

Q. You are familiar with this type of heater, aren't you? A. Well, yes.

Q. Quite familiar, aren't you?

Mr. Bell: I object to leading the witness.

The Court: That is leading to a certain extent.

Q. Would you say, Mr. Judson, that in your work as a [198] plumber that you had occasion to work with this type of heater before?

A. I had on different jobs, yes, but—

(Testimony of Thomas B. Judson.)

Q. And would you say you were or were not familiar with the type of inside drum; is that correct?      A. That's right.

Q. And I believe you testified in answer to Mr. Bell's question that there was a mesh outer casing and that you had often stood there warming your hands. Is that correct?      A. That's correct.

Q. And on those occasions, you had been able to see the inside drum?      A. That's correct.

Q. Now, when you answered his Honor's question as to this drum lying off some little distance from the place where the stove had been, did you recognize that drum as a drum similar to the type that was inside the casing?

Mr. Bell: I object to it as leading and suggestive. This is his own witness.

Mr. Butcher: I'll withdraw that question.

The Court: I think it is leading; it suggests the answer, counsel.

Q. Can you identify, in any way, that drum you saw lying to one side, as identical or similar to the drum inside the casing; if you can, do so? [199]

A. Well, that's so long ago, I just don't in my own mind.

Q. Say what's in your own mind.

Mr. Bell: No, I object to that.

Mr. Butcher: Well, he's got a right——

Mr. Bell: Oh, no——

The Court: Well, counsel, that would not be a conclusion to state his—as near as his recollection can permit—to whether it appeared to be similar

(Testimony of Thomas B. Judson.)

or otherwise. I think that would be proper. Not your belief but——

A. I believe it was similar. It's hard to say because it was just laying there—split up—I don't know.

Q. Now, in your best opinion—having seen this instrument, also having seen the trash barrel—in your best judgment—was it a trash barrel or the inner lining of a stove?

A. I would say the inner lining of a stove.

The Court: One thing more, counsel. Where were these trash barrels that Mr. Bell asked you about. Were they inside or outside the barracks?

A. As I recall, I believe there was one right by the door—where we go out.

The Court: Well, how near the stove is that?

A. Oh, I'd say approximately twenty or twenty-five feet.

The Court: Any further questions?

Mr. Bell: One more.

#### Re-cross Examination

Questions by attorney for Defendant:

Q. How many of those trash barrels did you have in the whole barracks? [200]

A. I couldn't say. I believe there was one by the door, as I recall.

Q. And the others, where were they located?

A. I believe outside the barracks.

Mr. Bell: I think that's all.

The Court: That's all.

(The witness left the stand.)

Mr. Butcher: Now may I——? I call Mr. Mulcahy.

The Court: Yes.

Mr. Michael Mulcahy, called as a witness in his own behalf, was duly sworn——.

Mr. Butcher: Oh, if Your Honor please, may I make a request. I have been expecting a witness to come all morning; that's why I stepped out a little while ago, and he has arrived, according to Mr. Herrick. He is a man employed at the Post of the military and informed me over the telephone this morning that he would have to return immediately, and I would like to confer with him for just a moment and then put him briefly on the stand.

The Court: Well, would you need a recess for that Counsel, or shall we just wait? We can give you five minutes, if you wish.

Mr. Butcher: I would appreciate five minutes.

The Court: Very well. We will take a recess for five [201] minutes while you confer with the witness.

(Thereupon the court recessed from 10:45 a.m., to 10:55 a.m.)

Mr. Butcher: Now, Your Honor, I had just called Mr. Mulcahy, and he had not yet taken the stand. Now I would like to call Mr. Krupa in his place, and call Mr. Mulcahy later.

The Court: Very well.

Mr. Butcher: Mr. Krupa is employed at the Base and has a rather important assignment, and he would like to return to it promptly.

LEO EDWARD KRUPA

was called as a witness on behalf of the plaintiffs, was duly sworn, took the stand and testified as follows:

Direct Examination

By Attorney for Plaintiffs:

Q. Will you state your full name to the court?

A. Leo Edward Krupa.

The Court: Will you spell that for us?

A. Leo, L-e-o; Edward, E-d-w-a-r-d; Krupa, K-r-u-p-a.

The Court: Thank you.

Q. Mr. Krupa, were you subpoenaed to testify on behalf of the plaintiffs in this case?

A. Yes, sir. [202]

Q. Mr. Krupa, where are you employed?

A. I'm employed by the Alaska General Depot, Quartermaster Section. I am the civilian in charge of their petroleum laboratory out at Fort Richardson.

Q. And how long have you been so employed?

A. Since February 1949.

Q. And independent of being in control of the petroleum laboratory, are you qualified as a chemist in connection with petroleum matters?

A. Well, I worked a year for the Gulf Research and Development Company near Pittsburgh, Pennsylvania, and I've got a bachelor of arts degree in chemistry.

Q. In chemistry. And you've worked for five

(Testimony of Leo Edward Krupa.)

years—your work out here has been in connection with petroleum products?      A. Yes, sir.

The Court: Your questions are quite leading, Counsel, particularly the last one.

Mr. Butcher: I'm just qualifying him as an expert, Your Honor, and not pertaining to—this part of it to any issue in the case.

The Court: Well, if he is called as an expert, his qualification is very important.

Q. And will you tell us what types of petroleum products you do work on at the Base?

A. Well, we test all petroleum products purchased by the [203] Army, Navy, and Air Force for all of Alaska. In other words all petroleum products purchased by any of the Services are supposed to meet specification limits. And we test these products to see that they do conform to these various limits.

Q. And that covers all petroleum products?

A. Yes, sir; all petroleum products purchased by these three Services.

Q. Are you familiar with the various fuel oils—Diesel oils—and gasoline?

A. Well, I'll put it this way. I'm qualified to speak of fuel oils purchased by the Army, Navy, and Air Force—also Diesel oils; but I can't say I'm qualified to speak of commercial products, such as like oils and Diesel fuels sold by Standard Oil of California or by Evenalt.

Q. Well, could you say what you do know, as a chemist that the oils used by the Army—by the

(Testimony of Leo Edward Krupa.)

military—for the various purposes such as heating and the operation of motor vehicles are similar, generally, to the commercial products?

A. Yes, sir.

Q. All right. Now, I'm going to put a hypothetical question to you, and ask for your opinion in the matter: Assumed for the purpose of this question that a large barracks located at King Salmon, Alaska, that in this barracks are what are called space heater stoves; one located at [204] each end of the barracks. Occupying the barracks are some twelve to fourteen men with beds situated in proper conformance to each other. The stoves are fed through copper fuel lines from outside barrels, and stoves normally using the regular standard fuel oil. Now assuming that the month is October, and that it is anywhere from the first to the 11th of October, and the person responsible for filling the barrels with fuel is mixing diesel oil and gasoline in these quantities: Approximately 50 gallons of diesel oil to 5 gallons of gasoline, and pouring it into the barrels in that mixture, to be used as a fuel for operation of these heating stoves inside the barracks. Now, with those facts in your mind, would that be, in your opinion, a safe operation, or would it——

Mr. Bell: Now—excuse me. I thought you were going——

Mr. Butcher: (cont'g) ——or would it contain hazards which might be dangerous to life or limb or property?



(Testimony of Leo Edward Krupa.)

Mr. Bell: Now, Your Honor, I object to the hypothetical question as not being proper in form. It contains items that are not in evidence and overlooks, or has not mentioned, items of vital importance. Therefore the hypothetical question is an improper question and is not subject to being answered.

The Court: I followed that question very closely, counsel, and cannot agree with your contention. I believe [205] it is properly put. The objection is overruled.

A. In my opinion, it is definitely an unsafe practice.

Q. Would you tell us why?

A. Well, I'll have to speak in somewhat technical terms. Now fuel oils have a definite minimum flash point, and it is set up by your ASTM Society, which is a society that sets up the standard, and it is normally followed by all your oil companies. Now, the flash point is a good indication of the fire hazards properties of the fuel oil. The lower the flash point, the more dangerous the fuel is. Now for instance stove oils have a minimum flash point of 100 degrees. Diesel fuels have a minimum flash point somewhat higher. Now, gasolines have flash points of anywhere from minus 30 degrees to minus 50 degrees. Now, by adding gasoline to Diesel fuels or stove oils, you lower the flash point of the stove oil to, depending on the concentration of the gasoline in the stove oil, you increase—the greater the concentration of the gasoline in the stove oil, the

(Testimony of Leo Edward Krupa.)

greater your fire hazard. Now, when the flash point of your Diesel fuel gets down below 100 degrees, for classification purposes, it becomes dangerous. Like, for instance, fire fighting departments will prohibit such fuels wherever they can, whenever the flash point becomes lower than 100 degrees.

Q. Would you say then, Mr. Krupa, that by adding roughly five gallons of gasoline to 50 gallons of Diesel [206] oil it would put the flash point below 100?

A. Yes, sir, definitely. Any time your concentration is above 5% gasoline, your flash point gets much lower than 100 degrees.

#### Cross-Examination .

Questions by Attorney for Defendant:

Q. Which—Mr. Krupa, which has the higher or lower flash point, Diesel oil or fuel oil?

A. Well—both of them normally are used as fuel oils. We'll classify them this way: Stove oil and Diesel fuel. Stove oil is normally used as a heating fuel. Diesel fuel is mostly used in Diesel equipment; however it can be used as a heating fuel. Normally the stove oils have the lower flash point; but very seldom do they go below 100 degrees; if so they aren't following the ASTM standards.

Q. As I understand, Diesel oil has a flash point quite a lot above 100, doesn't it, normally?

A. It can vary—normally, now, it will vary anywhere from about 140 degrees to 200 degrees.

(Testimony of Leo Edward Krupa.)

Q. Now and this that is manufactured in the big oil fields of Texas and Oklahoma and California—that's the oil you use up here; isn't it?

A. No, sir, I can't say that, sir.

Q. Where do you get it? Where did it come from? [207]

A. Which oils are you speaking of?

Q. I am speaking of Diesel oil, the same that you are talking about.

A. I know, but are you speaking of Diesel fuels purchased by the Army or by Standard Oil——?

Q. If you know, generally used up here. I am not confining you to anyone.

A. Well, sir, there is good evidence that a good bit of your petroleum products can be traced from practically all over the world: from Saudi Arabia and anywhere in the United States.

Q. Well, they used practically the same flash point in Diesel oil wherever it comes from; don't they?

A. No, sir; not necessarily. They do adhere to a minimum flash point. In other words your Diesel fuel will not go below a certain temperature. The flash point of that particular fuel will not go below a certain temperature. However, above that temperature it can go to approximately 200 degrees.

Q. Well in using it you spoke of in equipment—for Diesel equipment; it has to be around or above 100 to be useable in that equipment, doesn't it?

A. Diesel fuel?

Q. Yes.

(Testimony of Leo Edward Krupa.)

A. I said before, sir, that Diesel fuel is normally higher than 100 degrees—[208]

Q. I know.

A. —It will probably be higher than 120.

Q. Now, then the fuel oil—

A. Correction, sir, stove oil?

Q. Stove oil. That generally is around 100, is it?

A. A minimum of 100, sir. There again it can go anywhere from 100 up to 150.

Q. Well, in your use, how high does it have to go before you refuse it—or refuse to accept it?

A. There is no maximum limit, sir.

Q. No maximum? A. No, sir.

Q. Well, naturally if it lights and will burn, that is all you want in it; isn't it? Stove oil?

A. No, sir. There are other properties that are desirable. This is only one of the properties.

Q. Well, the part that lights or ignites in fuel oil is really gasoline, isn't it?

A. Well, to be technical, sir, it's a gas. In other words the liquid is vaporized; it become gaseous. Whenever you get a certain gas-air mixture, then it can ignite. For instance in petroleum products, if your mixture—your gas-air mixture above your liquid is anywhere from one to six per cent, it will ignite. If it goes above six per cent, [209] the gas mixture in there is too rich; it will not ignite. If it goes below one per cent; it is too lean, in other words there is too much air; it also will not ignite.

Q. Now, the only portion of fuel oil that will ignite from lighting—like you have to light it in

(Testimony of Leo Edward Krupa.)

stoves—is the part that is used in making gasoline; isn't it? That portion——

A. No, sir. No, sir.

Q. Well, what else in it will make——?

A. You burn it all. A Diesel fuel is——

Q. ——will light with a match or paper or anything?

A. Would you restate that question, again?

Q. I say the part that will light from a match or paper—a burning paper—to just come in contact with it. That part that will ignite is based upon the gasoline, isn't it?

A. No, sir.

Q. Well, what else is in there? With the gasoline that will ignite?

A. Well, sir, you'll just have to classify it as that certain fraction of Diesel fuel. That's all. You can't classify it as gasoline or kerosene or a naphtha or anything like that.

Q. Well, you can throw a match into kerosene, and it will put the match out, won't it?

A. Yes, sir. [210]

Q. And it will do the same thing with oil?

A. Yes, sir.

Q. Now, then, if it's got gasoline enough mixed with it, the match will light it, won't it?

A. Yes, sir.

Q. Now, that's what I'm trying to get you to tell us. How much content of gasoline does this oil have to have to light it with a match?

A. Well, I can best answer that, sir, with an example: We've had Diesel fuel with a flash point

(Testimony of Leo Edward Krupa.)

of 140 degrees. Now, let me explain the "flash point." The flash point is the temperature of your liquid at which the vapors above it will ignite——

Q. Of course. Now, how high, to say a flash point, how much gasoline is there in the total mixture to where it will ignite with a match?

A. Well, there again it depends on the Diesel fuel, and it depends on the gasoline. Different gasolines need different concentrations, and also different Diesel fuels will need different concentrations; there again depending on the flash point of both. I can best answer your question by an example: We had a Diesel fuel with a flash point of 140 degrees. Now, we added two per cent by volume of aviation gasoline, and the flash point was lowered from 140 down to approximately 90. [211]

Q. And how much did you add to it, 2%?

A. 2% by volume, yes, sir.

Q. 2% by volume. Well, now if five drums were connected together, and they contained 50 gallons each, and would hold 250 gallons, or approximately; and 5 gallons of gasoline was added to that, what proportion——

Mr. Butcher: Your Honor, I object to that question on the grounds that that is not the fact in evidence. The fact in evidence is that he added 5 gallons.

Mr. Bell: No, there is no——

The Court: Every 55 gallons. I recall no testimony about 5 barrels being connected together, Counsel. The testimony to that was—Mr. Franz—

(Testimony of Leo Edward Krupa.)

was that the bull cook told him he added—there was a 55 gallon barrel. That he added 5 gallons of gas to 50 gallons of oil. Therefore the question is not proper. Objection is sustained.

Mr. Bell: Your Honor, I'm sorry. I didn't so understand it.

The Court: That's what he quoted.

Mr. Bell: All right.

Q. (Defense Atty, cont'g): Now, were you ever over at King Salmon? A. No, sir.

Q. Then you don't know what kind of a system they have for heating over there? [212]

A. No, sir.

Mr. Bell: That's all, I believe.

Mr. Butcher: That's all Mr. Krupa. Maybe, Your Honor, has something to say?

The Court: No, that is all. Now Mr. Krupa was subpoenaed here. Is it agreeable that he be excused? Do you have any objection, Mr. Bell?

Mr. Bell: No, I have no objection.

The Court: Thank you.

Mr. Krupa: Thank you, Your Honor.

Mr. Butcher: I'll call Mr. Mulcahy.

The Court: Mr. Mulcahy is sworn?

The Clerk: He was sworn.

### THOMAS MULCAHY

having been previously sworn as a witness in his own behalf, took the stand and testified as follows:

(Testimony of Thomas Mulcahy.)

Direct Examination

Questions by Attorney for Plaintiffs:

Q. Will you state your full name to the Court?

A. Tom J. Mulcahy.

Q. And are you the same Tom Mulcahy who is a party to the lawsuit against Haskell Plumbing and Heating Company?

A. Yes, sir.

Q. And what is your occupation, Mr. Mulcahy?

A. Plumber. [213]

Q. And how long have you been a plumber?

A. Well, I'd say around thirty-five or forty years.

Q. And during those years have you become familiar with all types of plumbing and heating?

A. Most of them, yes.

Q. Piping work?

A. Yes, sir.

Q. And you are a journeyman plumber?

A. Yes, sir.

Q. And are you a member of the Plumbers and Steamfitters Local No. 367?

A. Yes, sir.

Q. How long have you been a member of that organization?

A. Well, since 1915.

Q. And how long have you been a member of this Local?

A. Since '48. 1948.

Q. Now, do you know, of your own knowledge, whether in 1951 there was a contract between Local 367 and a contractor known as Haskell Plumbing and Heating?

A. Yes, sir.

Q. You are aware of that contract?

A. Yes, sir.



(Testimony of Thomas Mulcahy.)

Q. Now, were you subsequently employed by Haskell Plumbing and Heating? A. Yes, sir.

Q. In what manner were you employed?

A. As plumbing foreman.

Q. And how did you happen to get employed?

A. Through the Local 367.

Q. Were you issued a dispatch slip?

A. Yes, sir.

Q. What became of that dispatch slip?

A. I gave it to the steward.

Q. To the steward on the job? A. Yes.

Q. Who was that steward?

A. At the time I went out there, I believe it was "Ole" Franz. They was five of us went out there the first time, and I was out there two seasons, and I——

Q. You were employed in '51 as foreman, there?

A. That's right.

Q. For Haskell Plumbing and Heating?

A. That's right.

Q. And you say you were out in 1950: were you employed as foreman that year?

A. That's right.

Q. For Haskell Plumbing and Heating? Is that correct? A. That's right.

Q. All right, now, when did you go there then, Mr. Mulcahy? A. In '51, or—— [215]

Q. '51. 1951.

A. In '51. I went out there, I believe it was the first week or so in May, 1951.

Q. And did you remain there throughout the

(Testimony of Thomas Mulcahy.)

summer months and autumn months up to October 11th?     A. That's right.

Q. And all that time you were in the capacity of plumbing foreman?     A. That's right.

Q. And as foreman, what particular phase of work did you perform?

A. Well, I had charge of the plumbers on the radar stations out there. Radar work out there. The camp, as they called it.

Q. Who was your immediate superior?

A. Jules Ferer.

Q. And what was his capacity?

A. Superintendent.

Q. For whom?

A. Haskell Plumbing and Heating Company.

Q. Were you paid during that period of time? In 1951, by Haskell Plumbing and Heating Company?     A. That's right.

Q. Who signed your check?

A. Jules Ferer. [216]

Q. Were you acquainted with a man named Ben Holbrook?     A. Yes, sir.

Q. Was he a plumbing employee of Haskell Plumbing and Heating?     A. That's right.

Q. Working under your supervision?

A. That's right.

Q. And doing plumbing work?     A. Yes.

Q. Was Mr. Ben Holbrook there on October 11, 1951?     A. Yes, sir.

Q. Now, where were you quartered during the summer and autumn months of 1951?

(Testimony of Thomas Mulcahy.)

A. In a big Quonset hut, they called it. About 80 or 100 yards from the messhall, and Haskell's quarters that he had there for Jules Ferer. It was about 100 yards.

Q. And in whose control, if you know, was the quarters you occupied. Who furnished them to you?

A. Haskell Plumbing and Heating Company.

Q. And was that furnished to you, if you know, by virtue of the contract under which you were working?

A. That's what it was furnished under; by the contract.

Q. And you also had your meals furnished, did you not?

Mr. Bell: I object to leading the witness. I tried to avoid that all the time. [217]

The Court: That question is leading, but it has been asked and answered so many times that it seems quite harmless at this time.

Mr. Butcher: Well the meals had nothing to do with it.

The Court: No, they had not. It is immaterial, anyhow.

Q. (By Atty for Plaintiffs): Let me ask the question: Who furnished you meals?

A. Haskell Plumbing and Heating Company.

Q. Under the terms of this same contract?

A. That's right.

Q. All right. Now, were you also acquainted with Jesse Hobbs? A. That's right.

(Testimony of Thomas Mulcahy.)

Q. Was Jesse Hobbs there during the summer and fall months of 1951? A. Yes.

Q. In what capacity?

A. Jess was in there as a steamfitter; but slept in the same barracks we did. The plumbers and the fitters were together.

Q. Who was he employed by?

A. Haskell Plumbing and Heating Company.

Q. Was he under your supervision?

A. No, sir. [218]

Q. He was not. But he lived in the same barracks with you? A. That's right.

Q. Now, will you describe the inside of the barracks?

A. Well, it was a barracks about as wide as this room, and I'd say, maybe, twice as long as from here back to that wall. It was a big Quonset hut that was put there by the fishermen, Libby, McNeal, and Libby owned the camp before the construction started out there. The height, I would say, was about like this ceiling; it was an oval shaped Quonset hut.

Q. What was inside of this building?

A. Well, in one corner there we put the deal in—the bathroom—toilets—bath—and showers. And there was two heaters; one about ten feet back from this door, and about ten feet back from this door there was a heater. And there was one ten feet back from this door.

Q. And will you describe those heaters, if you can?

(Testimony of Thomas Mulcahy.)

A. Well, I don't know the name of them but they was a regular space heater. Now, they had a drum inside the heater—inside the encasement—and as one of the members said here, it was for heat and we often put our gloves on there to dry them, or warm our hands, and the two heaters furnished heat for the Quonset huts.

Q. And they were connected up through tubes to outside barrels? [219]

A. That's right; half-inch galvanized pipe.

Q. Now, do you know what kind of a base they set on?

A. Well, the one on that end; call it that end of the building was on a concrete block; and the one——

Q. Off the floor?

A. Off the floor. And the one way up at this end, had a two by four railing around there and was filled with dirt.

Q. And the stove was sitting on the dirt?

A. The stove was sitting on the dirt. Yes.

Q. If you know, were they being used as heaters in the first part of October? A. That's right.

Q. They were being used as heaters on October 11th? A. That's right.

Q. Will you tell us, if you know, what happened on October 11?

A. Well, that was the day we had the fire out there.

Q. And how did you learn about the fire?

A. Well, there was a cement finisher come up;

(Testimony of Thomas Mulcahy.)

we had just hauled the men to work, and he came up there in a jeep that was furnished by his contractor, whoever they were; I don't remember who he was working for—and came up there and hollered at me and said, "Tom, you'd better get your boys and get out there. Your house is on fire." So I went [220] around and I picked "Ole" and I believe it was Callaway, and went by and picked them up and told them, and the news got around and some of the rest of the boys came out there, after we had got out there. By the time we got out there, the Quonset hut on the floor of it just looked like a bed of coals in a locomotive or something.

Q. From one end to the other?

A. From one end to the other.

Q. Could you approach near it?

A. No, we couldn't get near it.

Q. You were unable to get your property out?

A. No way of getting it out.

Q. Now, Mr. Mulcahy, after the fire went out, were you still there?      A. Yes, sir.

Q. How long did you stay there?

A. Well, we stayed there; we tried to get Jules Ferer to let us go to town and we had to have some clothes. We didn't have anything left only what we had on—work clothes, is what we had. So, Jules told us that we could go to town, but we had nothing to go to town with, only what check we had; I don't know about the rest of the boys, I know that's all I had. It was just a check that I had coming. I didn't have but probably maybe \$5.

(Testimony of Thomas Mulcahy.)

Q. Did you remain there after the fire had gone out? [221]      A. Yes. Yes.

Q. You were. After it had gone completely out?

A. That's right.

Q. Did you make any investigation or inspection of that barracks?      A. Yes.

Q. Will you please tell us what you found?

A. Well, I went in there, after the coals and everything had cooled off, so you could get in. I went in and I took some pictures in there. I went in and we looked for stuff and I found gold out of a watch that I had there. It was hanging on a little shelf there and it had burned and went down. I knew about where my stuff was, and I went there and commenced looking. All I ever found was the gold out of that. And my gun, it was burned.

Q. Don't testify as to any property.

A. All right.

Q. I want to know if you made any investigations as to the cause of this fire?

A. Well, I wouldn't say I made an investigation as to the cause of it, but I went in there and the stove at this end of the barracks was laying off of the base where it was setting—about four or five feet I'd say. And there was a split; I'd say it was half inch, and it was laying over on its side—.

Q. Was this split up and down or—?

A. It was a half-inch wide and I would say it was about 14 inches.

Q. 14 inches—

(Testimony of Thomas Mulcahy.)

A. A bulge in the inner lining of that tank.

Q. In the fire box?

A. In the fire box or whatever they call it.

Q. All right, now. Did you examine the other stove?

A. Well, it was still setting up on the base.

Q. Will you describe its condition as to its condition before the fire? This other stove.

A. Well, they was both burned when we left there, and this one was knocked off of the base, and the other one was still setting on the base; and in the bathroom there, the heater—the hot water heater in there was still setting, as it had been all the time.

Q. Then, you are saying with reference to the other stove, it hadn't changed its position at all, is that right? A. That's right.

Q. Except for the fact that there had been a fire around it, it was the same as it was before?

A. That's right.

Q. You say you took some pictures?

A. Yes, sir.

Q. (Counsel hands a picture to the witness.)

Q. I hand you what purports to be a picture, and ask you if you recognize that? A. I do.

Q. Is that a picture taken by you?

A. It is a picture taken by me, yes.

Q. How many days after the fire, if you recall?

A.. The second day.

Q. The second day. And where did you have the film developed?



(Testimony of Thomas Mulcahy.)

A. Up there on Fourth Avenue. Its between "C" and the first street this way. It's on that side of Fourth Avenue.

Q. Near Macks?

A. Yes, Macks, I believe.

Q. Macks Photo?           A. Macks Photo.

Q. Here in Anchorage?       A. Yes.

Q. And that is one of the pictures you got back from the films?       A. That's right.

Q. Now, I would like to have this marked for identification, Your Honor, as Defendant's Exhibit No. 3, following which I will offer in evidence.

Clerk: Whose? (Referring to exhibit.)

Mr. Butcher: The Plaintiffs. [224]

(The exhibit was then returned to counsel by the Clerk who then handed it to Mr. Bell.)

Mr. Bell: I object as not being properly identified.

The Court: Your objection is overruled. It may be admitted as Plaintiffs' Exhibit 3.

Q. (By attorney for Plaintiffs): I hand you Plaintiffs' Exhibit No. 3 and ask you if that is—if the picture shows the remnants of the Quon-set hut or barracks building after the fire?

A. That's right. It does.

Q. And what is that little building in front?

A. Well, that was the tool shed. It apparently looks like it's right close to there, but it was about, I'd say 75 feet from the barracks, and we used it as a tool shop—as they called it—a tool shop. As

(Testimony of Thomas Muleahy.)

far as the construction, it was no part of our work.

The Court: May I see that, Counsel?

(Exhibit handed to the court. Exhibit then returned to Clerk.)

Mr. Butcher: That's all.

### Cross Examination

Questions by Attorney for Defense:

Q. Mr. Muleahy, I believe you stated you worked there in 1950 and 1951, both?

A. That's right. [225]

Q. When you first went out there, where did you stay?

A. The first three weeks, we stayed at the Skytel Motel.

Q. And was your board paid there by the Haskell Plumbing and Heating Company?

A. That's right.

Q. And you had rooms there at the Skytel, too?

A. That's right.

Q. Didn't you?                      A. That's right.

Q. Then, later, you moved to new quarters?

A. That's right.

Q. Now, was the Motel crowded?

A. That's right. They asked Haskell to get what men they had out of there because the fishing season was coming on and they needed the space.

Q. Now, you spoke of this Quon-set hut belonging to Libby McNeal and Libby. Is that the canneries: Libby McNeal and Libby?

A. That's the cannery. I said that they'd built

(Testimony of Thomas Mulcahy.)

it. It had to be—been using it.

Q. Then after that, you don't know who it belonged to?      A. No.

Q. When you first went over there, it was not in use, was it by any of the contractors?

A. No. [226]

Q. Do you know what connection Gaasland Construction Company had over there?      A. No.

Q. Well, you knew there was a Gaasland Construction Company?      A. Yes.

Q. I believe you stated they were the general contractors, is that right?

A. Well, I don't know.

Mr. Butcher: (interposing) Well, I don't—

Mr. Bell: Well, I withdraw it; maybe he didn't. Someone did.

Q. (By attorney for defense): Were they the general contractors on the job?

A. Yes, as far as I knew. Yes.

Q. So far as you know then—(coughs). Excuse me. Gaasland Construction Company was the general contractor and Haskell Plumbing and Heating Company was the sub-contractor?

A. That's right.

Q. And you were foreman for Haskell Plumbing and Heating Company?      A. That's right.

Q. Now, were your beds made that day at noon; the day of the fire, at noon, when you were there in the Quon-set hut. [227] Were your beds made?

A. Sometimes they were made in the morning and sometimes they were made in the afternoon. I

(Testimony of Thomas Mulcahy.)

can't remember whether they was made that day of the fire or not.

Q. Can you remember anything; whether it had been swept out or cleaned up since you left that morning?

A. I couldn't remember that.

Q. Now, did you know about them mixing this gasoline and oil together? A. No.

Q. You never heard of that?

A. I had nothing to do with it.

Q. Now, this Quon-set hut was a steel frame, was it not, a steel frame?

A. Galvanized iron. Corrugated galvanized iron.

Q. And what was the floors made of?

A. Wood.

Q. Wood. Were they ply wood?

A. No, they was some kind of grooved lumber, I think. I wouldn't say for sure what they was, but they was wood. I know that.

Q. Did you ever see these five drums outside of the place?

A. They wasn't five drums outside the place.

Q. Well, how many were there? [228]

A. There was three.

Q. Three. And, you are quite sure there was not five there, aren't you?

A. I know there wasn't.

Q. Now, did you ever see this bull cook that came there and cleaned up the place for you?

A. No, I don't know who he was.

(Testimony of Thomas Mulcahy.)

Q. You also don't know whether he was employed in the general cooks out there or not?

A. Well, there was somebody that made up the beds and swept the place out; but who he was, I don't know.

Q. Did he come from up at the general cook shack that is there, did he?

A. Well, they had a place up there for him to sleep, I suppose, and Gaasland furnished it; I don't know.

Q. I see. Now, then you never did talk to that man at any time?           A. No, sir.

Q. You ate your meals in the general cook shack?           A. In the messhall, yes.

Q. And so far as you know, the Haskell Plumbing and Heating Company paid for the meals eaten by the plumbers?           A. That's right.

Q. And also paid for their keep, of course?

A. Yes. [229] \* \* \* \* \*

### Redirect Examination

Questions by Attorney for Plaintiffs:

Q. I believe your answer to Mr. Bell's question: "As far as you know, Haskell Plumbing and Heating Company paid for your meals"?

A. That's right.

Q. Your answer to that is that as far as you knew, they did. Well, you don't know whether they did or not, do you?

A. I don't know whether they paid for them. I know that our keep was furnished, according to

(Testimony of Thomas Mulcahy.)

our contract. Our keep, as they called it, board and room, is paid for by the contractor that hires us through our Local.

Q. During all the time that you were down there, did you ever look beyond your own employer for your board and keep? A. No, sir.

Mr. Butcher: That's all.

The Court: That will be all then, Mr. Mulcahy.

Pardon me, just a moment. (The Court then called the bailiff and talked quietly to him.)

Mr. Butcher: If Your Honor please, that brings us to a point where we propose to introduce into evidence as [230] evidence, the deposition of one, Jesse Hobbs. Now this deposition now before the Court is rather voluminous, and a great deal of it covers the identical material covered in the interrogatories, and under the ruling of the Court made yesterday, I have limited the testimony of each of these plaintiffs who have been called as direct witnesses to the bare facts leading up to the fire, and have not gone beyond the fire on the grounds that the interrogatories were fully covered. In Mr. Hobbs' deposition, I propose to introduce that part of it also and nothing beyond that although it's all in the volume. Now, would that be in accordance with the Rule?

The Court: In accordance with the Rule, you may introduce part of it, but as I understand it, your adverse party may then—or has then the right to request that it all be introduced.

Mr. Butcher: Well, the ruling that Your Honor

made yesterday that the testimony of these men——

The Court: Well, no. That was not the logic of that, Mr. Butcher. The thought in admitting these interrogatories was precisely the same as the deposition,—in effect, a deposition, and it was not necessary to hear additional evidence on those points.

Mr. Butcher: Well, then wouldn't that be——

The Court: The entire interrogatories were to be [231] considered; not just a portion of them.

Mr. Butcher: Yes. Well, now we have the interrogatories in there for Mr. Hobbs——

The Court: Yes. The purpose of admitting them was to avoid the necessity of calling the witnesses for oral testimony on the same subject; not to exclude a portion of the interrogatories.

Mr. Butcher: In view of the fact, then, that we already have Mr. Hobbs' testimony in the interrogatories, which is the greater part of this deposition already in evidence——

The Court: Yes.

Mr. Butcher: Then, it would seem to me that on the base of Mr. Hobbs' limitation would be the same as these other witnesses, and we would introduce the same type of testimony from the deposition, which we had taken down in Seattle the other day, and leave the greater bulk of it to that covered by the interrogatories.

The Court: Well, I still don't quite get your point. It is up to you whether you wish to offer the deposition in evidence. Excuse me just a second. Rule 26(d) (4) states that “\* \* \* \* if only a part of a deposition is offered in evidence by a party,

an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts." [232]

That is a little different than what I had just stated. It is the adverse party that can require that it be all introduced; but may introduce any other parts. So that—pardon me—Can require that all of it be introduced which is relevant to that part, which would be the particular subject as to which you offer it. But even at that the adverse party may introduce all other parts, if he wishes to.

Mr. Butcher: That are relevant to the part that are——

The Court: No. That's not the way I read it. He can require that you introduce all of the rest of this evidence——

Mr. Butcher: Well, I have no objection——

The Court: ——or that he may introduce——

Mr. Butcher: ——but I thought, Your Honor——

The Court: ——all of it.

Mr. Butcher: ——we've called witness after witness, and we have limited them to those questions not involving the loss of their property which is fully covered by interrogatories. Now the same situation exists as to Mr. Hobbs——

The Court: Yes.

Mr. Butcher: ——instead of calling him here and putting him on the stand, we've called him down at [233] Seattle——

The Court: Yes——

Mr. Butcher: ——and covered that same material that is in the interrogatories.



The Court: —so that you need not call him here. The subject matter being covered by his deposition.

That portion of the deposition relating to the subject of his employment, and the fire, may then be admitted in evidence, subject to any further offer or requirement which the defendant may have.

Mr. Butcher: Then, may I take the stand, Your Honor, and read the deposition in so far as I feel that it is applicable in conformance with the limitations which Your Honor has——?

The Court: Would you consider that necessary? Is it the practice here?

Mr. Butcher: It has been the practice wherever I have introduced a deposition—is to read it. Mr. Bell is that your practice?

Mr. Bell: Well, it is one of the recognized practices for the attorney to take the stand and read it; it is all right. He doesn't have to under the law, I don't think.

The Court: We have not been doing that here because of the——

Mr. Butcher: Well, I don't have any desire to do it, [234] Your Honor, it is just that I thought that was the proper procedure. I remember in the Dushon case which was the case that required 28 days of trial in which Mr. Grigsby and I represented the plaintiffs; we read, I guess, twenty or thirty separate depositions taken from all over the country, and Judge Dimond required that we take the stand and read question and answer, so that the reporter got it read into the records.

The Court: Very well. That may be the better practice, if requested. Therefore the deposition which has not yet been opened or published may be published at this time, and you may read from it as desired.

Mr. Butcher: The point is, Your Honor, that the reporter, if she makes up a transcript of the record——

The Court: Yes, I see.

Mr. Butcher: ——will make it up as testimony from her record.

The Court: Yes.

(The Clerk opened a sealed envelope and handed it to the attorney for the Plaintiff.)

(Mr. Harold J. Butcher, attorney for the plaintiffs, took the stand and testified as follows:)

This is in the District Court for the Territory of Alaska, Division Number Three at Anchorage. Jimmy Weeks, Tommy [235] Judson, Mike Cullinane, Ole Franz, Roy Callaway, Tom Mulcahy, Ben Holbrook, Jesse Hobbs and W. Van Smith, Plaintiffs, vs. Haskell Plumbing and Heating Company, Inc., a corporation authorized under the laws of the State of Washington and doing business in the Territory of Alaska, Defendants.

This is the deposition of Jesse Hobbs.

“Be it remembered that the deposition of Jesse Hobbs was taken pursuant to Notice of Taking Deposition and written stipulation of counsel, attached hereto, on Thursday——”

The Court: (interposing) I think you need not read the formal parts.

Mr. Butcher: I'll dispense with reading the certificate, then, and also the appearances of counsel which the deposition will show and also the stipulation between counsel appearing that they were taken at—ahead of the time stated in the notice by stipulation, and proceed directly to the examination.

\* \* \* \* \* [236]

### JESSE HOBBS

one of the plaintiffs, having been first duly sworn by the Notary Public, testified in his own behalf as follows:

#### Direct Examination

By Mr. Gemmill:

Q. Will you state your full name?

A. Jesse A., for Abner, Hobbs.

Mr. Gemmill: The testimony here will be just like it would be in Court under oath. You swear that what you are testifying is the truth.

The Witness: That's right.

Q. (By Mr. Gemmill): And your present address is what? A. 12030 Renton Avenue.

Q. What is your occupation?

A. Steamfitter.

Q. Were you employed at King Salmon, Alaska, also referred to as Naknek, Alaska, in 1951?

A. Yes, I was.

Q. And by whom were you employed up there?

A. I was dispatched from this Local in Anchor-

(Deposition of Jesse Hobbs.)

age down to work for the Haskell Plumbing and Heating Company who had a mechanical contract at King Salmon at that time.

Q. When you say you were dispatched by the Local at Anchorage, you mean the Local Union?

A. The Local Union, yes.

Q. Plumbers Union?

A. No, Plumbers & Steamfitters Union.

Q. Does that have a number?

A. I think it is 367. I forget. That number slips my mind. I believe it is 367.

Q. When did you go to King Salmon, Alaska?

A. It seems to me that it was around the first of September or the middle of September, or right in there.

Q. What year? A. Of 1951.

Q. Where were you living or residing at the time that you went to King Salmon?

A. Before I went to King Salmon?

Q. Yes.

A. Let's see: in 1951 I was in Anchorage, and that year I believe I was staying—boarding and rooming with a friend of mine up there in Anchorage.

Q. Did you make application with the Haskell Heating and Plumbing Company for employment before you went to King Salmon?

A. No. It doesn't work that way with plumbers and steamfitters. They call into the Local for so many men to be dispatched by the Local there.

Q. By "they" you mean the employer?

(Deposition of Jesse Hobbs.)

A. Yes, the employer. And the Local dispatches the men from the Local Union to the job wherever it may be, under the negotiated contract. There is an agreement that is written up and all plumbing and heating contractors must sign that agreement before any men are dispatched to them to cover their fairness in pay and also the working conditions that would become involved throughout the work.

Q. When did you first receive notification that you were to go to King Salmon?

A. Well, the day,—let's see: it was in 1951—it was in the fall, I think it was. I think about—I would have to look up in my records to see, my work records, where my checks were first dated, but the date that I think that it was was in September. It was late in September or the first of October. I don't remember the exact date now, exactly.

Q. Who notified you?

A. The business agent. He wrote out the dispatch from the Steamfitters Local at Anchorage.

Q. Business agent for this Union?

A. Yes, for the Union.

Q. Notified you?

A. Yes. And the day that our dispatch was written was the day set that we were on the payroll. And then we caught the next available transportation out of Anchorage to Naknek, to the King Salmon area.

Q. Were you transported up there by plane?

(Deposition of Jesse Hobbs.)

A. We were transported by plane at the company's expense.

Q. Where did you first live when you landed at King Salmon?

A. Well, we came into the barracks there which were—there was one barracks that all of Haskell's men were assigned to. And I believe we had one logger was staying there also—a pipe logger.

Q. Did you go immediately to the barracks when you arrived there? Did you go immediately to the barracks that you continued to occupy throughout your job?

A. Well, when we landed from the plane down at King Salmon a truck came down and picked us up and took us up to the camp site, which was, oh, probably, approximately a mile from the airport; and then we were billeted, and we picked up our bedding, our sheets and our blankets and pillow, and we were escorted over to the barracks which were occupied by the fitters and the plumbers.

Q. Did anything happen to those barracks later on?

A. Yes. The barracks burned one day right after the mid-afternoon meal. We went out, and we went over to the job site and was working and someone came over and told us that our barracks was afire, and that we should go over there and see if we could salvage anything. And then when we got up to the barracks it was just such a raging fire that you couldn't even get close to it.

(Deposition of Jesse Hobbs.)

Q. These barracks which you have mentioned, was that a Quonset hut?

A. It was a Quonset hut, yes, and it had a toilet and lavatory and shower, toilets, lavatories and shower, and a shower there in it, and it had two—two, I think that it had—two heating stoves, oil heating stoves, and it had one hot-water tank, which was in the men's latrine. And I believe that they were oil-type burners.

Q. For the hot-water tank?

A. The hot-water tank had oil-type burners.

Q. This was the Quonset hut which you occupied when you first went up there?

A. Yes, that is true.

Q. You mentioned being escorted over to this Quonset hut from the airport?

A. From the airport.

Q. By truck?

A. It was. It was the truck that the men was—they used, that they used to transport men from the camp to the job.

Q. Whose truck was it?

A. Now, the truck,—now, that is the question I have asked. That was a—Haskell had it, but I think they had it as a rented truck from, from the Army at that time, and it was a kind of a power rig, you know. It had a winch on it, and it had the back end enclosed so that, you know, in taking the men back and forth to the job, to the job and back to the camp, that they *would in* out of the weather,

(Deposition of Jesse Hobbs.)

in rain or bad weather. And that is the truck that they met us with.

Q. Do you know who drove the truck? I mean whose employee drove the truck?

A. Haskell's employee drove the truck and he just happened to be the plumber foreman.

Q. Do you remember his name?

A. Oh, I know it as well as mine, but I can't think of it. I just can't (witness pauses)—oh I just can't think of it—Mulcahy was his name—Tom Mulcahy.

Q. Are you acquainted with Jimmy Weeks?

A. Jimmy Weeks? Yes. I know Jimmy Weeks.

Q. And Tommy Judson?

A. Tommy Judson, yes, I know him.

Q. Mike Cullinane? A. Cullinane?

Q. Cullinane, yes. A. Yes, I know him.

Q. Ole Franz? A. Ole Franz, yes.

Q. Roy Callaway? A. Roy Callaway, yes.

Q. Tom Mulcahy? A. Yes, I know him.

Q. Ben Holbrook? A. Ben Holbrook, yes.

Q. W. Van Smith? A. Van Smith, yes.

Q. You are acquainted with all of those?

A. Yes. Well, maybe I had better say that Van Smith—Van is dead at the present time. He was killed up in Anchorage.

Q. Did these men occupy the same hut or barracks as you occupied? A. Yes, they did.

Q. That is, from the time that they arrived there until the thing burned down? A. Right.



(Deposition of Jesse Hobbs.)

Q. Where were you when you were first told where you would live at King Salmon?

A. Well, we knew that as soon as we were passed out any jobs. We were told that the contract was negotiated that the men will have first class room and board—would you ask that question again? I seem to——

Mr. Gemmill: Maybe you had better read that again.

(Question read by the reporter.)

A. Oh, that's right. I was at the camp site.

Q. Who told you where you were to go?

A. This plumber foreman and the shop steward, who went along with us, and said this is the barracks that we stay in, and said that Haskell had arranged for Haskell's men to all stay together.

Q. Did any one tell you where you would eat your meals?

A. No, that wouldn't be hardly necessary due to the fact that there was only mess hall there. That was understood that we would eat at the mess hall.

Q. Did you take some personal belongings with you when you went to King Salmon?

A. The way we fellows work,—at the present time my wife was down at the States here, down at Seattle, and we go up there to go up and stay, and we go up in the spring and we take all our personal belongings, and every place we go we take them along with us.

(Deposition of Jesse Hobbs.)

Q. And did you take your personal belongings with you to King Salmon?

A. Right. I took all my personal belongings with me to King Salmon.

Q. Without going into details, naming each article which you had, will you describe generally what belongings you took with you up there to King Salmon?

A. Well, you take a suit of clothes, your suit and your top coat and all your dress clothes, besides——

Q. The reason isn't necessary, just what you had with you.

A. And you take all your working clothes, and you take—then you take all your fishing gear if you, you know, if you like to fish, and I happen to be one that cares for fishing. And there was good fishing there, and every place I go in Alaska I always take my fishing gear and things; and you take all your work clothes, heavy work clothes because it was the fall of the year, and we had all our—we always come prepared for any kind of weather, according to what kind of weather we have. You have to have all the different types of clothes due to the fact that you go up there in the spring of the year and then you go through the summer months and then you go into the winter before you get home, and you have all your clothing with you and all your personal belongings that you would have and use in the matter of—throughout the year.

(Deposition of Jesse Hobbs.)

Q. Where did you keep these articles of personal property when you were at King Salmon?

A. Well, we had above, or rather by the bed we had a rack there, a metal rack there, and it had a rod in it, and we had—I hung my—on all the beds they had that, and we hung our clothing up, our best clothes, of course, and——

Q. You say you “hung them up there.” What——

A. I hung them up on this rack there in the barracks right by my bed.

Q. In the barracks that you folks occupied?

A. Yes. And what stuff that was personal that we didn’t want anybody to mess around in we kept in our traveling bags. Then our clean clothes——

Q. Where did you keep your traveling bags?

A. I kept mine under the bed, my cot.

Q. In the barracks?

A. Yes. And then we had fashioned out of boxes our table by our beds. And then we had incidentals in that, in those boxes we had our stationery, pens and pencils and all kinds of writing materials and candy and so forth. And then there was, you know, castor oil, if you wanted it——

Q. Your bed and bedding was furnished up there?

A. The bed and the bedding was furnished there, yes.

Q. Do you know who furnished that?

A. Well, as far as I know, Haskell was supposed to furnish it. He was supposed to furnish free room and board.

(Deposition of Jesse Hobbs.)

Mr. Ehrlichman: I object to that as not responsive.

Q. (By Mr. Gemmill): Were you able to salvage any of your personal property after this fire or during the fire?

A. Everything was a complete loss.

Q. Did everything in the barracks burn up?

A. Everything in the barracks burned up completely. There was just ashes left. Anything that was metal was all molded together. All of our records, birth certificates, all of our important papers,—and even anything that was metal whatsoever was just a skeleton left. That was all. It was a tremendous hot fire.

Q. Generally speaking, what stage was the fire in when you first saw it?

A. The stage, the fire—well, the smoke and flame was shooting out of both ends of the Quonset hut and it was so hot that you couldn't even get near it.

Q. What kind of material was the Quonset hut made of?

A. The outside was metal and the face, the front and the back, well, it seemed to me that it was hard board, and with, you know, it had, we'll say, it was hard board was the face of it, and it had windows in it. It was just the regular standard Quonset hut. It was quite long.

Q. Did you or any of the other plaintiffs whose names I have mentioned have anything to do with

(Deposition of Jesse Hobbs.)

taking care of the stoves in the Quonset hut where you lived?

A. On all those jobs like that on maintenance work in the barracks and throughout the camp site the plumbers and the fitters had the jurisdiction over the maintenance and the—the maintenance of pipe lines or anything, like in the mess hall, we have to take care of all the running in lines, hot water lines, and they set up the camp, and the main things of that sort, such as oil and water and like that.

Q. Did you or any of the other plaintiffs put oil in those stoves?

A. No, we didn't put oil in the stoves. They had what they call the bull cook. The bull cook took care of—what I think—what actually—they would, the driver would, they would pick up the oil down at the King Salmon in barrels. They'd have it pumped in barrels and then the truck driver would haul them up to the respective camp sites and from that there they would deposit them up—so many at each building, and these bull cooks in that certain area would go out and pump with a fuel pump from the barrel into the barrels that was set up on the stand and that would feed the stoves and the hot-water tank.

Q. Who employed the bull cooks?

A. The main contractor, which was—Gaasland.

Q. Gaasland?           A. Yes.

Q. Who hauled the oil?

A. Gaasland hauled the oil.

(Deposition of Jesse Hobbs.)

Q. Was there any gasoline around the camp?

A. Well, yes, there was gasoline in the camp. The barrels were all piled together, and it has been rumored that——

Q. You can't testify to rumors; just to what you know.

A. Well, they were—the way they were piled up there, there is a possibility that——

Mr. Ehrlichman: I will object to what was a possibility.

Q. (By Mr. Gemmill): You can only testify to what you know.

A. Oh, I see. I know that all the barrels were all together.

Q. Were there any barrels—do you know, were there any barrels delivered to the Quonset hunt that you occupied that had contained gasoline?

A. I can't say. No, I don't know. I couldn't answer that. But certainly something caused that thing to take off like that with an explosion, with such an explosion. They said, the bull cook——

Mr. Ehrlichman: I will object to this as hearsay.

Q. (By Mr. Gemmill): You can't testify to what the bull cook said.

A. Not to what the bull cook said?

Q. No.

A. Well, I heard him say that. I heard him say——

Q. Well, that is still hearsay.

A. Yes, sir.

Q. The rules of evidence exclude that.

(Deposition of Jesse Hobbs.)

A. Yes.

Q. You listed your personal effects that you lost in your Complaint, did you not, in your Complaint in this action? A. Yes.

Q. You have alleged in your Complaint that you lost a suitcase? A. Right.

Q. Do you remember where you purchased that suitcase?

A. I got that at Frederick & Nelson's.

Q. Do you remember what you paid for it?

A. It was a Gladstone bag, and it was a good bag—I know it was \$35.00 or more for the bag.

Q. When did you purchase it?

A. Oh, about 1950, I think it was 1950.

Q. Do you know about what time of the year?

A. I think it was, well, it was in September, I think; around in that area, in there some place; I can't remember exactly—the exact date.

Q. What kind of material was it made of?

A. It was a leather bag. It was a brown leather.

Q. What was the value of that bag at the time it was destroyed by fire?

A. The value—well, it was a new bag. To me it was worth the price that I paid for it because it was a new bag.

Q. You also listed in your Complaint a traveling bag that you had with you at that time. What was the nature of that bag?

A. Well, it was a leather bag also, leather, and it was a brown bag. It was the type that well—you had a top that spread out—for a suit—you

(Deposition of Jesse Hobbs.)

know, a regular bag, you know; a suitcase that would open from the top, and it has clasps on it.

Q. Do you remember where you purchased that?

A. At Frederick & Nelson's.

Q. Do you remember what you paid for that?

A. I think it was around twenty to thirty; twenty dollars or more.

Q. And about how old was the bag at the time of the fire?

A. Well, it was purchased—well, it was just about a year old.

Q. What was the value of that bag at the time of the fire?

A. The bag was in perfect shape and it was just the same to me as a new bag.

Q. You have listed a shaving kit that you had with you at that time. What was the value of that shaving kit at the time of the fire?

A. I would say it would be worth, what I estimate it would be \$15.00 or more, due to the fact that when you go out on these out-of-town jobs you are not always sure of electricity. Sometimes the generators will break down and so forth, and you have to shave by, you know, other than an electric razor; and you would—you always take that along, one with a straight edge; just a straight edge. And then I had one—then I had a safety razor, and then I had brushes and astringent and all that stuff in it. It was quite a nice one. It was made out of leather.



(Deposition of Jesse Hobbs.)

Q. You say that the value of that was \$15.00?

A. Yes, it would be that and more.

Q. You have also listed a Remington razor. Was that destroyed by fire at that time?

A. Yes, sir; that was destroyed by fire.

Q. What kind of a razor was that?

A. It was a regular electric shaving razor. It was a Remington.

Q. What did you pay for that?

A. Oh, I think around—the nearest I can remember, it was about \$22.00 or more.

Q. And about what age was the razor at the time of the fire?

A. It was about, right around, I imagine, a little less than a year; right around a year old anyway.

Q. Was it in good working condition?

A. Very good condition, yes, it was.

Q. What would you say the value of that was at the time of the fire?

A. Around \$22.00. To me it was the same as a new one. And I would have to pay more than that for a new one, for the full price. It was the same as that to me.

Q. You listed slippers. A. Yes.

Q. Were they lost in the fire? A. Yes.

Q. What was the value of the slippers at the time of the fire?

A. They were about \$7.00. They were leather. You would buy them for \$7.00. They were leather slippers.

(Deposition of Jesse Hobbs.)

Q. And how about the slippers, about how old were the slippers at the time of the fire?

A. Well, they were less than a year old. I think my wife got them for me.

Q. Did you lose some shoes in the fire?

A. Yes, I lost Oxfords, you know. I lost three pair of Oxfords. And I lost my working boots and my rubber galoshes and all that stuff that you have along with you.

Q. Three pairs of Oxfords you say you lost?

A. Yes.

Q. What did you pay for the Oxfords?

A. Well they run right around from—right around \$15.00.

Q. For each pair?

A. For each pair, yes. I have a hard time—I have a hard foot to fit. My feet are hard to fit. I have to buy—I have a small foot with a high in-step and it's wide and it's very hard—I can only buy shoes, you know, at a certain place or certain prices, and they're pretty—they run a little higher than the average.

Q. About what age were these shoes—these Oxfords that you lost in the fire?

A. Oh, they were, they were practically new ones. They were, oh, probably six months old at the most.

Q. You mentioned losing some work boots. What kind of material were they made of?

A. They were heavy work boots. As a rule I have two pair of boots that I take on a job. The pair

(Deposition of Jesse Hobbs.)

that I had on at the time, working, and then I always had a spare pair. Some were leather and some were—out in the gravel you might lose a sole or something like that, and then I always have a pair that I can always have on hand that I can have the other ones fixed, send the other ones in and have them fixed.

Q. What did you pay for the boots?

A. \$18.00. I paid for those \$18.00. I got them at the Bon.

Q. What kind of material were the boots?

A. They were heavy; heavy work boots.

Q. What kind of material were they?

A. They were leather.

Q. And you paid \$18.00 for them?

A. Yes. They have a hard toe and a steel instep and——

Q. And how old were those boots at the time of the fire?

A. Well, I got them just before I went up there, and in fact there is one pair that I hadn't worn yet. I was still wearing the pair that I had.

Q. Was there another pair of work boots besides the one pair, the leather ones?

A. Well, yes; well, I had—then I had the rubber boots that I have always carried along, and then overshoes, too, to put on.

Q. What did you pay for the rubber boots?

A. The rubber boots, as far as I can remember I think they run about eight or ten dollars—right around ten dollars.

(Deposition of Jesse Hobbs.)

Q. Had you worn them some?

A. I had worn them a few times.

Q. And then your overshoes—what did you pay for them?

A. The overshoes I got, I believe, up in Anchorage. Let's see—I think they ran right around, the rubber overshoes, they run around \$7.00 or \$8.00.

Q. Had you worn those at all?

A. No, I hadn't worn those because—well, due to the fact that you take those along for the winter, to put over your boots, and I hadn't worn them.

Q. And you got those shortly before you went to King Salmon?

A. Yes, before I went to King Salmon.

Q. Didn't you lose a suit?

A. Yes, I lost a suit.

Q. What kind of a suit?

A. Well, it was a blue suit. It was a blue suit that I got down at Frederick's in 1950.

Q. What did you pay for it?

A. \$80.00.

Q. Was it a dress suit?

A. Yes, this was a dress suit.

Q. Had you worn that some prior to the fire?

A. Yes, I had worn it some, but it was in excellent condition.

Q. What would you say the value of it was at the time of the fire?

A. Well, the value of the suit would be just the same as a new suit because it was in good condition.

(Deposition of Jesse Hobbs.)

That is, there was nothing the matter with it. It was in first class shape.

Q. Did you lose some dress shirts?

A. Yes.

Q. How many?

A. Three white ones; three white ones that I know of besides my ties and——

Q. What did you pay for the dress shirts?

A. They were good dress shirts, and they cost about \$10.00; right around \$10.00.

Q. For the three?           A. Apiece.

Q. Ten dollars apiece?

A. Right around that; right around \$10.00 apiece.

Q. Had you worn those?

A. I had worn them. I had, yes. And they had been laundered. Yes, I had worn them.

Q. What would the value of those shirts be at the time of the fire?

A. The shirts were in excellent condition, and they were in the same state as new shirts would be.

Q. Did you lose any other shirts besides these dress shirts?

A. Yes, I lost work shirts, and then I had—usually a fellow takes along a couple of sports shirts.

Q. How many work shirts did you lose?

A. As far as I can remember, either three or four. There would be all of four, something like that.

(Deposition of Jesse Hobbs.)

Q. What kind of material were the work shirts made of?

A. They were a heavy wool, heavy wool shirts.

Q. What did you pay for each of those wool work shirts?

A. I imagine right around \$10.00; \$10.00—something like that.

Q. For each one? A. For each one.

Q. About how old were they at the time of the fire?

A. They were practically new. They were new at the time, due to the fact that I hadn't worn them. They were for winter, you know, for cold weather. And I got them previous, before going to Alaska.

Q. And you mentioned a sport shirt—one or more sport shirts? A. Yes.

Q. What kind of material were the sport shirts made of?

A. They were regular sport shirts. I don't know very much about material, but they were good.

Q. Wool or cotton or—

A. They were, I would say wool; I don't know the type of material, but they were good shirts.

Q. How many?

A. Either two or three.

Q. Do you remember what you paid for them?

A. I imagine around \$6.00 or \$7.00.

Q. For all of them? A. No; each.

Q. How old were they at the time of the fire?

A. They were practically new.

Q. Had you worn them some?

(Deposition of Jesse Hobbs.)

A. I had worn them some, but they were in excellent shape.

Q. What would you say the value of those sport shirts were at the time of the fire?

A. They were in just such good shape and they were the same as new shirts, so the value to me would be the same as a new shirt.

Q. Did you lose any sox?

A. Yes. Yes, I lost some dress sox. And I lost—I lost all my heavy work sox and my light work sox that I had.

Q. What was the value of all of your sox that you lost in the fire?

A. Well, I would say about, right around between \$30.00—right around \$30.00 or more, the best that I can remember.

Q. Do you remember how many pairs of each kind of sox you had?

A. I had at least six pair of sox. I had six pair of dress sox. I always had that many along; and then either six or eight pair of wool sox—about eight pair of work sox.

Q. What kind of material were the work sox made of?

A. They were a heavy wool—boot sox—and they were very good.

Q. Did you lose a top coat?

A. Yes, I lost a top coat; I lost that.

Q. Where did you buy that?

A. I think it was at Frederick's. It was in very good shape. I had worn it off and on, but it was in

(Deposition of Jesse Hobbs.)

very good shape. It was the same as a new coat to me.

Q. When did you buy that?

A. In 1950, I think.

Q. Do you remember what you paid for it?

A. \$60.00, as I remember. Yes, \$60.00 or more.

Q. What would the value of that be at the time of the fire?

A. The value of that would be the same as a new one because it was in very good shape.

Q. Did you lose any gloves?

A. Yes, a couple of pair of gloves—dress gloves. And I always bought a dozen or a dozen and a half of work gloves.

Q. What did the dress gloves cost?

A. I think,—they ran right from \$7.00 to \$9.00 a pair, about \$7.00 or \$8.00 a pair; something like that.

Q. Had you worn the dress gloves?

A. Yes, I had worn the gloves. They were the same as new gloves, though.

Q. And what did you pay for the work gloves?

A. Well, the work gloves would run right around 50 cents a pair.

Q. Did you lose any underwear in the fire?

A. Yes, I lost my summer underwear, T-shirts and so forth, and they were all in good condition because I got some new ones oh, in just about August, in Anchorage—tops and shorts and then my winter underwear was all brand-new underwear that I had not worn. I hadn't worn them yet.



(Deposition of Jesse Hobbs.)

Q. What did you pay for the woolen underwear?

A. They ran right around \$10.00 to \$12.00 a pair.

Q. And you had how many?

A. I had three pair of heavy wool underwear.

Q. Which would run?

A. Which would run right around \$36.00.

Q. Had you worn those at all?

A. No, I hadn't worn those.

A. And what did you pay for the summer underwear?

A. The summer underwear, I would say right around \$15.00.

Q. For all of it?

A. Yes, for all of the summer underwear.

Q. Did you lose any work clothes?

A. Yes, I lost all my overalls, my shirts——

Q. You mentioned shirts.

A. Well, yes, overalls and work pants that I have underneath. They were all in good shape. And sweatshirts. And a heavy parka. There was a parka. And then I had one of these alpaca-lined jackets.

Q. All right. Now, let us go back over these. What did you pay for the work pants?

A. The work pants ran right around \$6.00 or \$7.00 a pair.

Q. What material were they made of?

A. They were made out of whipcord material.

Q. And about what age were they?

A. The age was—I got them new before I went

(Deposition of Jesse Hobbs.)

to Alaska there, and—that would be less than—right around six months.

Q. You had worn those some?

A. Some, yes.

Q. And your parka. Where did you buy the parka?

A. I bought it in Alaska at the surplus store.

Q. Do you remember what you paid for it?

A. I paid \$25.00 or more for that heavy parka.

Q. And had you worn that before the fire?

A. No, I hadn't worn that before the fire.

Q. And what would you say the value of it was at the time of the fire?

A. I would say that the value of it was the same to me as new.

Q. The alpaca jacket. Where did you buy that?

A. I bought that up there, too, at the surplus store.

Q. What did you pay for the alpaca jacket?

A. I think it runs between, about, right around—it ran \$20.00.

Q. And was it new?                      A. It was new.

Q. And was your parka new when you purchased it?                      A. Yes.

Q. Had you worn the alpaca jacket prior to the fire?

A. I think I had worn the jacket a couple of times.

Q. What would you say the value of it was at the time of the fire?

(Deposition of Jesse Hobbs.)

A. The value of it would be the same as a new one to me because it was in good—excellent shape.

Q. Did you lose a hat?

A. Yes, I lost a Stetson hat.

Q. Where did you buy that?

A. I bought that at the Bon.

Q. Here in Seattle?

A. In Seattle, here, yes.

Q. Do you remember what you paid for it?

A. I think I paid either \$18.00, \$15.00 or—\$15.00; right in the neighborhood of \$15.00 for the Stetson.

Q. When did you buy that hat?

A. I bought that in 1950, I think.

Q. Had you worn that some? A. Yes.

Q. What did you value that hat at at the time of the fire?

A. The hat was in very good shape, and it was the same as a new one.

Q. Did you lose a cigarette lighter?

A. Yes, I lost a cigarette lighter. I think my wife got it for Christmas.

Q. Do you know what the value of that was?

A. \$10.00 or more for the lighter.

Q. Did you ever know what the purchase price of it was?

A. My wife told me it was \$10.00.

Q. What kind of a lighter was it?

A. A Ronson.

Q. How old was it?

A. Well, I had it—it was less than a year old.

(Deposition of Jesse Hobbs.)

Q. Did you lose some dentures or——

A. Yes, I did.

Q. ——or false teeth?

A. Yes. I had a partial upper and lower, and I didn't wear them to work that day, which was unfortunate.

Q. Where did you have those made for you?

A. I had those made at Clark's here in Seattle.

Q. Do you remember what you paid for them?

A. \$150.00.

Q. A hundred and fifty what?

A. A hundred and fifty dollars.

Q. And how old were they?

A. Well, now, let's see: they were about three years old, but they were in good shape. There was nothing the matter with them at all; they were in good shape.

Q. And did you lose some fishing equipment?

A. Yes.

Q. What did that consist of?

A. Oh, a couple of fly rods and then a casting rod and, oh, the flies and lines and sinkers and all of my tackle, box, and everything that I would have in it.

Q. Do you know about what you paid for all of that equipment?

A. Well, I would say it would—as a very conservative—it would be right around \$60.00 or more.

Q. How many casting rods did you have?

A. I had one; and two fly rods.

(Deposition of Jesse Hobbs.)

Q. Do you remember what you paid for each of those rods?

A. Right offhand I think around—I think those fly rods cost right around \$15.00 or \$20.00 each.

Q. Each?           A. Each, yes.

Q. And were they in good condition?

A. They were in very good condition. And my reels went, too.

Q. Oh, what did you pay for the reels?

A. I had an automatic reel, and then I had a couple of these winding reels. I think that the automatic reel ran right around \$15.00, that one, and the others I think ran around from \$8.00 to \$14.00.

Q. Do I understand you to say that you estimate the value of all of that fishing equipment——

A. And that's way low.

Q. ——at about fifty dollars?

A. Yes, I would, and that's way down low. It don't take long to put sixty dollars in the tackle box, alone.

Q. Did you lose a belt and suspenders?

A. Yes.

Q. What were they worth?

A. The belt and suspenders, they were practically new. They were, I think, right around, for the belt was right around \$5.00, with my initials on it, and——

Q. The suspender a couple of dollars?

A. Yes, right around a couple of bucks for them.

(Deposition of Jesse Hobbs.)

Q. Is there anything else that you lost that you——

A. Well, it's been quite a while ago and I—yes, I lost all my plumbing books; and I had books on heating, and a birth certificate, and all of that—the important papers that I had along with me; all that and all of my personal stuff, pictures and——

Mr. Ehrlichman: I think this is all down in the Bill of Complaint.

The Witness: Yes.

Q. (By Mr. Gemmill): What was the value, the combined value of all of the articles that you lost in the fire?

A. I think under a thousand dollars; right around nine hundred to one thousand dollars would be a conservative estimate; very conservative.

Q. The list of your personal property that you listed in your Complaint——

A. Pardon?

Q. The personal property that you have listed in your Complaint in the second paragraph of the VIII cause of action is a list of all of the items that you lost in this fire?

A. Yes, it is.

Q. I don't think you stated the date of this fire?

A. The date of the fire—let's see: I should never forget that. I can't think.

Q. Well, was it——

A. Well, it was—I can't——

Q. In October?

A. In October, yes. I can't remember. It was the 11th, wasn't it? Yes, the 11th.

(Deposition of Jesse Hobbs.)

Q. The 11th of October of 1951?

A. Yes.

Q. And are these figures which you have caused to be set off at each of these items which you have listed in your complaint, do they represent the value of those articles?

A. Yes, it does, and they are conservative figures on them.

Mr. Gemmill: I think that is all.

Mr. Ehrlichman: Off the record for a minute, please.

(Discussion off the record.)

#### Cross-Examination

By Mr. Ehrlichman:

Q. Mr. Hobbs, these values that you have placed on this property in your complaint and also in this deposition are replacement values, aren't they, as to what it would cost you to replace all these things that you lost?

A. Yes, and it's a conservative price, I think.

Q. Would it be what it would cost you to go into a store now and buy the same articles for?

A. It would. It would, yes.

Q. What airline did you go to Alaska on?

A. Let's see. I believe I went to Alaska on the—I believe it was the Northwest——

Q. To Anchorage? A. To Anchorage.

Q. And then what from Anchorage to Naknek?

A. It was the——

Q. The PNA?

(Deposition of Jesse Hobbs.)

A. I think it the Pacific Northern flies out there; I am not sure.

Q. And you had these two bags with you, the Gladstone and the wide-topped bag; is that right?

A. Yes, that's right. And then a pack sack.

Q. A pack sack? A. Yes, also.

Q. What sort of a device was that?

A. Well, it's a regular packsack that you can throw over your back, you know, and it has——

Q. Shoulder straps?

A. Shoulder straps and so forth on it.

Q. About what volume would that hold?

A. It would—the volume? Let's see.

Q. What dimensions was it?

A. Let's see. The packsack, I have to take a look and see. (The witness produces a measuring tape.) It's about, well, it goes up and down your back and it hangs about, well, right around 36 inches long, I think; right around 30 to 36 inches long. And I imagine it would be in the neighborhood of 24 inches wide and it was the same in width.

Q. In other words, about two by two by three?

A. Yes, I imagine right round that—in that area.

Q. What did you have in there?

A. And it has——

Q. Soft goods?

A. Yes, I had, yes, work clothes.

Q. Did you have any other luggage at all when you went up to Naknek; when you went up to Naknek, besides those three pieces?



(Deposition of Jesse Hobbs.)

A. Yes, and then I had a duffel bag. There was a small duffel bag.

Q. Well, how big was that?

A. Oh, that only stood up about that high (indicating).

Q. About two feet?      A. Yes.

Q. And it was round?      A. Yes.

Q. Just a little pillow type duffel bag?

A. Yes, that's it.

Q. Any other luggage besides those four pieces?

A. No, only what I carried on my back.

Q. What was that?

A. My suit and coat and hat, and——

Q. Oh, you mean what you wore?      A. Yes.

Q. Oh, I see. You didn't carry a suit over your shoulder?      A. No, not over.

Q. Well, then, did any of this stuff come up by parcel post?      A. Yes.

Q. Or express, or anything of that sort?

A. Yes; some stuff came up that way.

Q. How long after you got there did it come up?

A. Well, my wife—oh, after I got to King Salmon?

Q. Yes.

A. Oh, no; none after I came to King Salmon.

Q. You carried what you had from Anchorage to King Salmon then in these four pieces that we have described; is that right?      A. Yes.

Q. Do you know the approximate weight of that luggage?      A. That I don't know.

(Deposition of Jesse Hobbs.)

Q. Did you have to pay excess baggage on PNA?

A. You never, you never paid any—we were or had any excess—all our tickets went together. How they did that, I have no idea. I don't know how they did that; I don't.

Q. You don't know how much your luggage weighed? A. No.

Q. But in any event, it was contained in the Gladstone and a traveling bag, and a pillow sized duffel bag? A. And the duffel bag, yes.

Q. Where did you keep your things that you could not hang up on a rack?

A. Well, in my suitcases and—in my suitcases and then on the edge of my bed, and there was a rack up on top—you know, above the bed there was a metal rack, you know, and we had our clothes on that, and then——

Q. Well, I am speaking of things like stockings that you could not hang up?

A. Oh, I usually kept them in my suitcase.

Q. And that is the same for shirts?

A. Shirts and stuff, yes.

Q. And underwear?

A. Underwear, yes, and——

Q. And work clothes?

A. Yes, my work clothes.

Q. And your parka and your jacket and your clothes hung up?

A. Yes; clothes hung up.

Q. Do you know a man named Lee Post?

(Deposition of Jesse Hobbs.)

A. Lee Post?

Q. Was he the camp manager while you were there?

A. No, I can't—I know Mr. Peterson, Pete Peterson. He was the camp manager, I think.

Q. He was a Gaasland employee?

A. Yes. He was a Gaasland employee.

Q. And his job was to supervise the lodging and the feeding, is that right?

A. Yes, all of Gaasland's work, yes; all of the camp and the, all of the—I think he was superintendent of the construction out there, and——

Q. Now, I am speaking of the man that was just the camp manager for the lodging facilities there. Do you recognize Lee Post as that man's name.

A. I couldn't tell you.

Q. In any event, the person that ran the mess hall and ran the rooming facilities was a Gaasland employee, was he not?

A. Now, that I don't know. I couldn't say, state that for sure.

Q. In any event, it wasn't a Haskell employee?

A. That I could not tell you either.

Q. You don't know?

A. Whether he was a Haskell or a Gaasland, I don't know.

Q. Didn't you know all of the Haskell employees personally?

A. I knew—yes, I knew Ferrere, Jules Ferrere.

Q. Well, didn't you know all the Haskell employees?

A. Yes, I knew——

(Deposition of Jesse Hobbs.)

Q. Were any of them in charge of the lodging facilities there?

A. I never saw the payroll. I don't know how the payroll was paid out, so I couldn't say; and I don't say that I could be an authority on it.

Q. You were only there for a period of about three weeks before the fire, is that right?

A. Yes; about three weeks before.

Q. Did you ever stay at the Sky Martel while you were there?      A. No.

Q. You moved right into the barracks?

A. Yes, I did.

Q. And some of the Haskell employees were already in the barracks, is that right?

A. Yes, they were.

Q. You were one of the last men to arrive?

A. Yes, all but Jules Ferrere, and Louis Ferrere, and probably some sheet metal men were there and some roofers, as far as I know.

Q. They were already well established there and had lived there about how long?

A. Since the job started; and I don't remember when the job started.

Q. It had been a matter of some months?

A. I imagine so. I would say that, yes.

Q. Did you ever have cause to prepare an inventory of the stuff that you took to Alaska prior to your arriving in Naknek?

A. Before I went to—

Q. Prior to your arriving in Naknek?

A. Yes, I knew I—take inventory? I know.

(Deposition of Jesse Hobbs.)

When I am going out like that, you always when leaving home you take it to know what you have along with you.

Q. Did you prepare a written inventory of what you were taking?           A. A written inventory?

Q. A list.

A. No, I can't say that I had prepared an inventory, no, sir.

Q. Did you at any time prepare a written inventory of your belongings prior to this fire?

A. No, I can't say that I had.

Q. In other words, the listing that you have given us of what you had there is from your own recollection at this time; is that right?

A. That is from what I know that I had along with me, yes.

Q. As best you can remember it now?

A. I did at the time of the fire, and I did at the time of the fire because Mr. Ferrere told us to make a list of all our personal effects that we had of all our complete loss.

Q. And when did you do that?

A. We did that, I think it was the following day after the fire, which was for Jules Ferrere, the superintendent for Haskell.

Q. He asked you to do that?

A. Yes, the superintendent for Haskell.

Q. And then when you did that you called upon your own recollection of what you had, rather than any inventory that you had written down; is that right?

(Deposition of Jesse Hobbs.)

A. Yes, from what I knew that I had along with me.

Q. And what did you do with that list that you prepared?

A. That list was forwarded to the Union Local in Anchorage, Alaska.

Q. Didn't you turn it in to Haskell?

A. I think we did, and I think that they turned it in to—I am just trying to remember for sure.

Q. You don't know where the list is? You don't know for sure where the list is?

A. I made a list. I think Haskell got a list, and I think the Local down there.

Q. And was the complaint drawn from one of those lists? A. Yes, it was.

Q. Which one?

A. Well, both of them were identical, when we made them out. When we made them out we made them identical.

Q. Did you ever have any cause to make a complaint to any one at the camp regarding the living facilities before the fire? A. Yes.

Q. To whom did you complain?

A. We complained to——

Q. Now, I want to know whom you personally complained to?

A. You want to know who I personally complained to?

Q. That is right.

A. To the—yes, to the shop steward.

Q. And who was he?

(Deposition of Jesse Hobbs.)

A. His name was Mike Cullinane, Mike Cullinane.

Q. He is one of the plaintiffs in this case?

A. Yes, he is.

Q. He was living with you there?

A. Yes, he was.

Q. And what was it that you personally complained about?

A. Well, about the—a number of times about the food there and then they changed the cooks there.

Q. And do you know offhand who the shop steward relayed your complaint to?

A. Well, not—of course, there was not only my complaint; it was the complaint of the group as a whole.

Q. And to whom were those complaints made?

A. They were taken to Mr. Pete—the superintendent.

Q. The Gaasland man?

A. Yes; and taken to Jules Ferrere. And they both met together and they all met together.

Q. The cooks were Gaasland employees, weren't they?      A. Yes, I think they were.

Q. And so then when the shop steward relayed the complaint, why Gaasland made a change, is that right?

A. Yes, we made the complaints and the shop steward took care of them.

Q. Is there anything else that you can recall complaining about besides the food?      A. Yes.

(Deposition of Jesse Hobbs.)

Q. I am talking about you, personally, now?

A. Me, personally?

Q. Yes.

A. No. Oh, that was about clean sheets, a couple of times they were late in getting the sheets in.

Q. The bull cooks were?

A. Yes; something to that effect.

Q. And so you made a complaint about that?

A. Yes.

Q. Anything else that you can remember?

A. No.

Q. In other words——

A. It was an established camp, and everything functioned fairly well, I would say; very well, I would say.

Q. Did you leave any possessions with your friend in Anchorage when you went up to Naknek?

A. No, I didn't.

Q. What is his name again? A. Oshiem.

Q. Will you spell his last name for me?

A. O-s-h-i-e-m.

Q. And where does he live?

A. He lives over in Kennewick now.

Q. In the State of Washington?

A. In the State of Washington; that's right. At least, the last I heard, he was; but he wasn't working over there, so I don't know whether he would be at Kennewick at the present, or not.

Q. From time to time did the heating stoves in your barracks need cleaning out?

A. Yes, they did. The type of oil they used was, it didn't burn too well.



(Deposition of Jesse Hobbs.)

Q. As a matter of fact, they were turned up high most of the time anyway, weren't they?

A. Yes, they didn't—I don't know. In fact, I don't exactly know whether they were high most of the time. But if they were turned down to—the oil was of such quality that they would soot up, and it would soot the pots and the whole thing, and they would have to be cleaned.

Q. And who did that cleaning?

A. That cleaning—the people who—Haskell took care of all—I don't know about the pots, inside of the pots.

Q. Do you know who did the cleaning out?

A. The cleaning out—you mean inside the fire pots?

Q. Yes.

A. Well, I never saw them do it, no.

Q. And you don't know?

A. I never saw them do it; no, I never saw them do it. I couldn't say as to that, because I never saw them do it, no.

Q. Okay. Was there any reason for taking dress clothes to a place like King Salmon?

A. Yes, there would be, due to the fact that wherever we go we take our possessions along with us. Like my wife, and my home is down here in Seattle,—

Q. You didn't expect to dress up in Naknek, I take it, did you?

A. Well, I don't see why not. If you go to Naknek in the evening, or anything, you clean up and—

(Deposition of Jesse Hobbs.)

Q. Did you ever go to Naknek in the evening?

A. Yes.

Q. Did you dress up in your blue suit?

A. Well,—

Q. And your Stetson hat?

A. Well, I wore it down there, and, naturally, I had no place to leave it.

Q. The blue suit?

A. Pardon?

Q. Did you wear your blue suit when you went to Naknek in the evenings?

A. Prior to the fire? I don't know. I never—I hadn't been to Naknek.

Q. Well, that's what I was just asking you—whether you ever did go to Naknek?

A. No, no.

Q. As a matter of fact, you didn't go, did you?

A. Not before the fire, no. I would say no, I didn't go.

Q. If you had gone, was there anything to do?

A. Yes, there were people living in Naknek. There were stores and there were bars, just like in a regular, normal town.

Q. As a matter of fact, your work clothes would have been good enough for the social life of Naknek, wouldn't they?

A. Well, I don't know. It's hard to say. Personalities—

Q. Come, now: be fair with us. Isn't that correct, Mr. Hobbs, that the—

A. I would say no. It might be, and in a way

(Deposition of Jesse Hobbs.)

it might not be. If you go to church or if you go down there to—for instance, if you go down there to go any place else, or if you are going any place as a rule, when you are going any place you usually clean up and look half-way civilized.

Q. Well, in any event during the three weeks that you were there prior to the fire, you never found any occasion to wear your blue suit; is that right?      A. That is right.

Q. Or your oxfords?

A. No, I guess not; I would say no.

Q. Or your white shirt?      A. That's right.

Q. Or your neckties, for that matter?

A. That's right.

Q. Who furnished you bedding?

A. Well, that is—whether it was Haskell or whether it was——

Q. Gaasland?

A. ——Gaasland, how they operated that, I would—that deal there I couldn't tell you.

Q. Well, as a matter of fact, you don't know how this fire started, do you?

A. No, I was not there at the time.

Q. And you didn't see anything afterwards when you did get there that caused you to be certain as to what started the fire, is that right?

A. Well, what I saw could have started the fire? Well,——

Q. I am not interested in scuttlebutt right now; just what you, yourself, know.

A. What I saw was there, this place—the place

(Deposition of Jesse Hobbs.)

was completely on fire. The fire was coming out through the front and coming out through the back. We went all the way around it.

Q. And that didn't help you to know what started it?

A. That's right; I wouldn't have any definite idea, personally.

Q. Have you experienced a loss of all of your personal possessions, or had you experienced a loss of all of your personal possessions previous to this?

A. Did I experience a loss?

Q. In other words, had you been involved in a fire, or some other catastrophe where you lost everything you owned before?

A. No, I can't say that I have.

Q. How is it then that you happened to have acquired everything that you had in 1950 except your teeth?

A. Everything I had with me?

Q. Yes.

A. Because it was all new. We came down from—in 1950 we came down from Anchorage. We had been living in Anchorage, and—now, how come I happened to buy all that, was due to the fact that I happened to buy the stuff.

Q. You just happened to go out and buy all new shirts and all new pants and all new work clothes and all new clothes and a new hat and a new suit and a new overcoat and a new bag?

A. That is right.

(Deposition of Jesse Hobbs.)

Q. Everything new in 1950?

A. And—no, I had other clothes besides that.

Q. What other clothes did you have?

A. I had a suit. I had more shirts, and I had stockings, and well, even overalls I had down here yet.

Q. In Seattle?           A. Yes.

Q. You had lots of old clothes in Seattle?

A. Well, I wouldn't say they were old clothes. They were average clothes.

Q. But none of those average clothes were in this fire?

A. No, because some of them happened to be down here.

Q. The only things that were in this fire were clothes that you had acquired within the nine months prior to this fire?

A. That's right. Well, you take good clothes because you take clothes that are going to stand—you know, that are good clothes, along with you.

Q. What kind of a razor did you have when you lived in Anchorage before?

A. What kind of a razor?

Q. Yes.

A. I would say it was straight edge, and I had a—one of these, well, there was a regular safety razor.

Q. Did you have an electric razor?

A. No, I never used an electric razor before.

Q. How long have you worked as a pipefitter?

A. Well, since I got my card in 1942.

(Deposition of Jesse Hobbs.)

Q. Where did you work as a pipefitter in Anchorage before you moved to Seattle with your wife?

A. Before I—where I worked before I moved to Seattle?

Q. Yes.

A. Yes, I was—in '46 I went up in the fall of '46, and I came back down to the States, and then we moved to Anchorage.

Q. Have you ever worked up around King Salmon and in that type of country before?

A. Why, I hadn't worked in King Salmon, no.

Q. Had you worked in any of these outlying projects there?

A. Let's see. Yes, I worked, I was down at Foreland, and I was down toward Fire Island.

Q. You knew what kind of conditions you were going to find at Naknek, pretty much, didn't you?

A. What kind of conditions?

Q. Yes.

A. As far as weather or what kind of conditions?

Q. I mean weather and terrain, and, oh, the type of job you were going on, and the type of work you were going to be doing, and all of that?

A. Oh, yes; all that is normal, yes.

Q. Everything that you had with you was either brand-new or as good as new, is that right?

A. Yes; it was all in good shape.

Q. You didn't have a single thing with you but what it was as good as new?

(Deposition of Jesse Hobbs.)

A. Well, yes, that is right; I would say yes.

Q. And everything that you had with you that you had worn for a period of time you considered, nonetheless, to be of the same value as a brand-new garment; is that right?

A. The value as it would be of a new one, as far as replacement, yes.

Q. But not as far as actual intrinsic value was concerned?

A. I don't see why not, because——

Q. Would you be willing to pay the same price for that Stetson hat—\$15.00 for that Stetson hat, as \$15.00 that you paid for it when it was brand-new, for a hat that somebody had worn for six months?

A. Well, as far as worn it,—if somebody else had worn it, I don't think I would want to buy it.

Q. No. And the same thing goes for——

A. As to that, the valuation to me would be for me to replace it; it would be——

Q. Well, we are not talking about replacement now. We are talking about what you paid, by buy and sell?

A. Buy and sell, yes. It was a good hat, and in good condition, and I had——

Q. And if a stranger had worn it six months, and I offered it to you, you would have paid the same price as for a new hat—is that right?

A. I don't buy—I wouldn't buy clothes that somebody else had worn.

(Deposition of Jesse Hobbs.)

Q. So you'd place a much lower value on it than the price of a new hat? A. No.

Q. Because somebody else had worn it?

A. No.

Q. Isn't that right?

A. Not as far as its valuation, because it might be worth to him \$15.00, but it probably would not be worth to me \$15.00.

Q. And the same for the sox that he had worn?

A. Well, you wouldn't—say I'd worn a pair of sox once, you wouldn't want to buy my sox. It's the principle of the thing.

Q. Well, let me ask you about your dentures. You say that they cost you \$150.00 when you got them? A. Yes.

Q. Did that include extractions?

A. Well, that I don't remember. I think I had most all of them out, all but a couple.

Q. There were some extractions at that time?

A. Oh, there was a couple of extractions.

Q. Included in the amount of \$150.00?

A. Now, that I couldn't tell you.

Q. And did you pay Dr. L. R. Clark cash, or was it on time? A. I think cash.

Q. There were no carrying charges in that, then?

A. No.

Q. How long had you had these fly rods?

A. Oh, I got those up there—or down here, rather. It was right around less than a year.

Q. You bought them both at the same time?

A. Practically, yes, at the same time.



(Deposition of Jesse Hobbs.)

Q. How did you happen to do that?

A. Due to the fact that all my fishing gear up there, I had sold that, or gave it away when we came down, because if we sent it down air freight, —I wasn't going to pay air express on a bunch of stuff.

Q. That goes for all of your fishing gear, then?

A. That goes, yes, for most all of my fishing gear.

Q. Had you ever used the rods before going back to Naknek?

A. Yes, I fished with them around Anchorage in some of the big lakes, up at Big Lake.

Q. How many times, do you remember?

A. And up at—oh, I fished around eight or ten times.

Q. When you went from Anchorage to Naknek, the things like the alpaca jacket and the parka and the work shoes, all of that, you checked through with your luggage, is that right?

A. Yes; it all went through with my luggage.

Q. They were inside of your luggage, then?

A. Yes, with my luggage.

Q. The things which you have stated in your complaint, in the cause of action which pertains to you, are all true, as you believe? Is that correct?

A. Yes, sir.

Q. And that goes for the answers to the interrogatories which you signed? A. Yes.

Q. And as far as who provided the living fa-

(Deposition of Jesse Hobbs.)

cilities and maintained them and inspected them, you just don't know, is that right?

A. That's right. I don't—we just—I really couldn't, because I never saw any of—I really couldn't put my finger on it and say that this man furnished this or that that man furnished that; I couldn't tell you.

Mr. Ehrlichman: I think that is all.

Mr. Gemmill: I have just one more question.

### Redirect Examination

By Mr. Gemmill:

Q. Are you the same Jesse Hobbs that is named as one of the plaintiffs in this action?

A. Yes.

Mr. Gemmill: That is all.

Mr. Ehrlichman: I will waive the signature, if it is all right with Mr. Hobbs, to this deposition.

Q. (By Mr. Gemmill): Mr. Hobbs, will you waive your signature to this deposition that will be written up by the court reporter?

A. Yes, sir, but I don't quite get the word "waive." Would you explain it to me, sir?

Q. If the record shows that you waive the signing of this deposition, it will be sent up to the Court at Anchorage without your signature. It will just be certified to by the court reporter who writes it up.

A. Yes.

Q. If you do not wish to waive the signing of the deposition, you will have to come back and read it.

A. Oh.

(Deposition of Jesse Hobbs.)

Q. And then sign it.

A. No, I will waive the signing.

Q. We must get permission from you, personally.

A. As far as I am concerned, yes, I will waive it.

Q. You will waive your signature to this deposition, then?      A. Yes.

Mr. Gemmill: And the record will show that both counsel agree to that.

Mr. Ehrlichman: That is correct.

Mr. Gemmill: That is all. Thank you.

(Witness excused.)

(Thereupon, the deposition of the witness, Jesse Hobbs, was concluded.)

[Endorsed]: Filed Jan. 4, 1955.

Mr. Butcher: \* \* \* Now, I would like to offer Mr. Hobbs' deposition again, for the rest of his testimony.

The Court: Very well, but please understand, the Court is not requiring you to do it.

The Court: Very well. (Laughter.)

Mr. Butcher: Yes. I understand.

The Court: Very well, then, the whole of the deposition may be admitted in evidence. I would not require, though, that it be read.

Mr. Butcher: Mr. Bell, will you stipulate with me that the whole deposition—all of it—go into evidence without being read?

The Court: No such stipulation is necessary. It has already been admitted upon your motion.

Mr. Bell: Now, Your Honor, I take it then that I have nothing to raise. The whole deposition, cross-examination and everything is in and you will read it yourself?

The Court: Yes.

Mr. Bell: Without us having to read it to you?

The Court: I assure you that the Court will read it.

Mr. Bell: Thank you. That's all. I am sure you will because I know I would if I were in your position. I would want to know it all. [252]

Mr. Butcher: Now, Your Honor, I have one other witness, and that witness will take probably two or three minutes, and then the plaintiff intends to rest.

The Court: Very well, you may call your witness.

Mr. Butcher: Maybe I'd better make this offer, first: Mr. Holbrook, one of our plaintiffs, is in Salyersville, Kentucky, more than 100 miles from this court. Under the Rule which we have discussed considerably, one of the rules is that a witness, in order to use his deposition for its full value, must be more than 100 miles from the court. My offer now is to prove, by myself, who received a letter just a couple of days ago from Mr. Holbrook stating that he could not be here for the trial. I want to get into the record by my testimony that he is in Salyersville, Kentucky, more than 100 miles from the court.

The Court: Do you have a deposition from him?

Mr. Butcher: I have only a letter which I received.

The Court: The purpose of it is to permit the deposition to be used?

Mr. Butcher: Well, his deposition is among those, Your Honor, already has in the record.

The Court: Oh, I didn't notice that.

Mr. Butcher: Mr. Holbrook's is there.

The Court: Well, surely you may make such proof; unless it was taken by stipulation. If taken by stipulation, that [253] wouldn't be necessary.

Mr. Butcher: It is exactly like all these others which Mr. Bell has required. Your Honor may have noticed on——

The Court: I find no deposition of Holbrook in the file, here.

Mr. Butcher: It is among the interrogatories, Your Honor.

The Court: Well, they have already been admitted, haven't they? All the interrogatories?

Mr. Butcher: Well the interrogatories for each man who has appeared here as plaintiff. Mr. Holbrook did not.

The Court: That was not my understanding. We've admitted all the interrogatories.

Mr. Butcher: All right, then.

The Court: Let's see, we checked that——

Mr. Bell: Your Honor, was there one there from Mr. Holbrook?

The Court: Just a minute. I believe so because there is one from everyone except Smith, who I

understand has since died. Let me see here just a minute. (Looks through file.) As I have it, your motion, Mr. Butcher, was to admit all of the interrogatories taken as depositions and the further oral evidence re matters contained in such excepting the proof of loss excluded. So your motion which was granted [254] included all the interrogatories.

Mr. Bell: I'd permit Mr. Butcher to testify without even being sworn if he wants to that Mr. Holbrook is in Salyersville, Kentucky.

The Court: I see no necessity of it as all of the interrogatories are before the Court. Well, perhaps you wish to protect the record. Very well; very well.

(Mr. Harold J. Butcher, attorney for the plaintiffs, was then duly sworn, took the stand and testified as follows:)

About the 20th of December I wrote a letter to Mr. Holbrook who resides with his brother, a State Senator, in Salyersville, Kentucky, asking him if he—notifying him of the date of this trial, and asking him if he could be present. He wrote me a letter and told me that for financial reasons, he could not come to Alaska from Salyersville, Kentucky, and be here at the time of this trial. And I make this statement on his behalf, Your Honor, to show that at the time of the trial he was more than 100 miles from the place where the trial has occurred.

The Court: Do you wish to cross examine, Mr. Bell?

Mr. Bell: No, Your Honor.

The Court: Very well.

(Mr. Butcher then left the witness stand.)

Mr. Butcher: The plaintiff now rests.

The Court: May I inquire at this point, Mr. Butcher, what proper disposition do you suggest be made as to W. Van Smith. I understood from the testimony that he is now deceased. No proof has been offered on his behalf, so I presume it would be in order to dismiss him as a party plaintiff?

Mr. Butcher: Well, I was going to make a suggestion, Your Honor, and I overlooked doing so. Mr. Van Smith was killed here by being stabbed in the back by a woman more than two years ago. The woman was tried on second-degree murder charge and was acquitted——

The Court: That would hardly be material; would it?

Mr. Butcher: Mr. Van Smith left a twelve year old child, and the Plumbers' Union has sought my advice as to whether that child could enter into the suit in place of his father, and it has been my advice that he could not. Maybe I am wrong, but in any event, his claim is only about \$500, the smallest one of all, and I was going to propose to Mr. Bell, if he would so stipulate, that in the event there is a judgment on behalf of the plaintiffs that Mr. Van Smith's claim be included in the judgment.

Mr. Bell: I would not have the authority to make a stipulation like that. As Mr. Butcher knows, I am just "carrying water" here. The key counsel are in Seattle and [256] they did—they know of course that Mr. Van Smith—is that his name?

Mr. Butcher: Van Smith.

Mr. Bell: Mr. W. Van Smith is dead, and there is no revival as to him. The case has never been revived.

The Court: Survival!

Mr. Bell: Well, it does survive very possibly, but it has never been revived under the statute. The action might survive—it's question I would certainly seriously urge—it is one that does not survive death of the plaintiff, but that hasn't come up yet, but there has never been any effort to revive the action under the statute.

The Court: Well——

Mr. Bell: Now, Your Honor, at this time we might put that right square up to the Court. I have a motion I was going to make and then—that would clear this issue and present it to you.

The Court: Well, I would rather dispose of this, first, Counsel.

Mr. Butcher: Let me say just one thing, then, Your Honor. It is my understanding of the statute that the action survives to the widow and not any young person. May be I—that is the reason I haven't given it any evidence here as to Mr. Van Smith's claim, and don't intend to.

The Court: I fear then that he must be dismissed as a [257] party plaintiff unless Counsel is willing to stipulate as you suggest.

Mr. Butcher: I wonder if we might defer that, and it is possible that Mr. Bell and his counsel in Seattle might stipulate that that small claim could be paid, if the plaintiffs were successful. They may not. It is a case that they might stipulate to.



Mr. Bell: I was just fixing to arise and move to dismiss it for want of prosecution. There is no evidence in the case. When you mentioned the matter there, I had it noted as number three——

Mr. Butcher: I won't propose that motion—  
Mr. Bell——

Mr. Bell: I would so move to bring this matter directly before you.

The Court: Well, there being no proof submitted upon behalf of the heirs of W. Van Smith, even if there were a survival—which is very doubtful, the case must be dismissed as to such plaintiff.

Mr. Bell: Now, Your Honor, since the evidence of the plaintiffs are all in, I have a series of motions that I want to make to put the record straight: First, I want to move to strike all the testimony, based upon the theory that I argued at the outset of this case: It was an improper joinder of parties plaintiff. And that the complaint did not state a cause of action in favor of any of the parties against [258] this corporation defendant. My second is: To strike the interrogatories. The evidence shows that they were never served on me; and the answers were filed in court but never served on me. Another reason to strike the interrogatories is that my position is they are improperly introduced. Your Honor knows my argument on that and I won't repeat it. Now then the third—the fifth proposition is: to dismiss the entire case for the reason there is no evidence of negligence on the part of the defendant. Now, in this case, the best that could possibly be said about the evidence is that the bull

cook, who was staying at the—around the general contractor's place—I don't believe he completely said that he was staying there, he said at the place provided for them by Gaasland, was where he must have been staying, and there is not a scintilla of evidence to connect this bull cook in any way with the Haskell Plumbing and Heating Company. The Haskell Plumbing and Heating men all stayed at the one place. They all testified to that; well, I wouldn't say everyone was asked the questions, but those that were asked stated they all stayed there. There was no bull cook stayed there. Now, if there was any negligence at all, it was somebody whom nobody knows, that mixed some gasoline and some oil that shouldn't have been mixed. Now, that's the end of all the evidence there is of any negligence. Now, there isn't a connection in the world with the Haskell [259] Plumbing and Heating Company with this negligence. And the most that can possibly be said—if there was any negligence—it was the negligence of some bull cook that one man stated pretty clearly was a man from the Gaasland place—the Gaasland Company. Now the deposition that Mr. Butcher has introduced of Mr. Hobbs—makes the statement:

“Was he the camp manager while you were there?

No, I can't—I know Mr. Peterson, Pete Peterson.

He was the camp manager, I think.

He was a Gaasland employee?

Yes. He was a Gaasland employee.

And his job was to supervise the lodging and the feeding, is that right?

Yes, all of Gaasland's work, yes; all of the camp and the, all of the—I think he was superintendent of the construction out there, and——

Now, I am speaking of the man that was just the camp manager for the lodging facilities there. Do you recognize Lee Post as that man's name?

I couldn't tell you.

In any event, the person that ran the messhall and ran the rooming facilities was a Gaasland employee, was he not?

Now, that I don't know. I couldn't say, state that for sure.

In any event, it wasn't a Haskell employee?

That I could not tell you either.

You don't know? [260]

Answer: Whether he was a Haskell or a Gaasland, I don't know.

Didn't you know all the Haskell employees, personally?

I knew—yes, I knew Ferrere, Jules Ferrere.

Well, didn't you know all the Haskell employees?

Yes, I knew——

Were any of them in charge of the lodging facilities there?

I never saw the payroll. I don't know how the payroll was paid out, so I couldn't say; and I don't say that I could be an authority on it.

You were only there for a period of about three weeks before the fire, is that right?

Yes; about three weeks.

Did you ever stay at——”

(Now that goes off on another matter.)

Mr. Bell: Now, Your Honor, I don't think it is a matter that needs argument. There is just no evidence, not the slightest to connect the defendant with any negligence, here.

The Court: First, we might without hearing from you, Counsel, dispose of this first motion. The motion to dismiss for improper joinder of parties plaintiff having heretofore been ruled upon—will be denied.

The motion to dismiss because the complaint fails to state a cause of action will likewise be denied.

Now turning to the question about these interrogatories, [261] and the question of the motion to dismiss for want of evidence to connect the bull cook as an employee of the defendant company—I should like to hear from Counsel.

Mr. Butcher: Well, in connection with the interrogatories, Your Honor, it is possible that they were not served upon Mr. Bell. As Your Honor will recall, the Court didn't pass upon the question of the interrogatories and did not require, in the face of my objection, that I even have them answered. But, I assured Mr. Bell, as he has known ever since, that I went ahead and got them answered and that I filed them promptly in the file and gave it to him, and all the time he knew they were there. The reason why they were not served upon him is that I had to hunt these men up all over the country to get the deposition—and go sometimes before the postmaster and other types of persons——

The Court: Just a moment. I think I can in-

interrupt you here on that. I am just examining these. If you will excuse me, Mr. Bell. Now take your first one. It appears in the file—Jesse Hobbs—at the bottom of the interrogatories, I find this:

“Receipt of Copy Acknowledged this 23rd of February, 1954. Bell & Sanders, Attorney for Defendant.”

The next one is: [262] (Searches through file) Ben Holbrook. The same endorsement. (Continues to turn file.) The next one is Lyle Franz. The same endorsement.

Mr. Bell: Are they all the same?

The Court: Yes, sir.

Mr. Bell: By whom? Your Honor.

The Court: I'll look back here. (Turning the file pages back.)

Mr. Bell: I don't have it in my file.

The Court: There is an initial after the word Bell & Sanders, but I am frank to say I can't read it. Perhaps I can on this next one. I'll look again. “Bell and Sanders.” It looks like WHS. Would that be Mr. Sanders' initials?

Mr. Bell: That would be Mr. Sand——

The Court: “WHS”.

Mr. Bell: “WHS” would be his initials.

The Court: That is what it appears to me to look like. Now the same——

Mr. Bell: I believe I accepted service on one—one answer.

The Court: Well, if you will permit me to continue here. The same thing appears as I said on Franz. With the same initials. The next is Jimmy

Weeks. The same endorsement on the 2nd of April '54. Bell and Sanders. It also looks like "WHS." The next one is [263] Michael Cullinane. The same endorsement appears under date of April 2nd with the same initials. The next is Thomas Judson. The same endorsement on the same date. The same initials. The next is Roy Callaway. The same endorsement on the same date; without any initials. The next, and think the last, is Tom Mulcahy. The same endorsement; the same date; and the same initials.

I think that disposes of your motion, Mr. Bell.

Mr. Bell: Your Honor, I explained we don't have one of those in none of the answers——

The Court: The record speaks for itself. You have acknowledged receipt of a copy.

Mr. Bell: It does.

The Court: I would like to hear from you then. This motion regarding interrogatories is denied. The only other question then is—the motion to dismiss for want of evidence.

Mr. Butcher: For the purpose of now arguing this motion, Your Honor, I have prepared an argument for the final part of the case. I will not present my entire argument. I will at this time only present sufficient authority to show you this motion does not lie well, and should not be given any consideration whatever.

We have a situation here in which a contractor entered into a contract with his employee to perform certain [264] functions for him, in addition to his salary. Separate and independent function of

furnishing his board, and the furnishing of the room. That is a written contract. The contract of his employer furnishing a room—call them quarters or whatever you will. Along with such quarters, he naturally assumed that they had to furnish comfortable and properly heated, and properly sanitized, and properly cared for quarters. Now that was contracting obligation.

He could enter into a contract with the independent contractor, in some circumstances, to sublet part of the work that he was required to do under his contract through an independent contractor, and any damages caused by that independent contractor couldn't make the primary contractor liable. But, a written contract, Your Honor, takes the rule of independent contractors out of the picture entirely, and the law—and the law everywhere—supported by a multitude of ruling cases, holds that the contractor may not delegate those parts of a written contract, which he has made with his employee, to a third party to perform. He can't get out of it that way. I give, Your Honor, the list of citations.

The Court: Well, your point would be that it makes no difference——

Mr. Butcher: That is true.

The Court: ——whether this bull cook was an [265] employee of the general contractor, or of Haskell Plumbing and Heating?

Mr. Butcher: It makes no difference.

The Court: I'd like to hear from you on that.

Mr. Butcher: Do you want to hear——?

The Court: Yes. I would like to hear from you on that.

Mr. Butcher: Referring, Your Honor, to Volume 27, American Jurisprudence, page 525. Under the general heading of "Nonperformance of Absolute Duties of Employer" "—Under some circumstances, duties are imposed upon an employer which he cannot delegate to another; and where this is the case, he is liable for their nonperformance even though he employs an independent contractor to perform the actual work. \* \* \* Likewise, one who, by a specific agreement, undertakes to do some particular thing, or to do it in a certain manner, cannot, by employing an independent contractor, avoid responsibility for an injury resulting from the nonperformance of any duty or duties which, under the express terms of the agreement or by implication of law, are assumed by the undertaker. This doctrine has been applied with reference to many kinds of agreements."

I call Your Honor's attention to Volume 35, under the general heading of "Master and Servant" at [266] page 533.

The Court: What volume?

Mr. Butcher: Volume 35, American Jurisprudence, at page 533 under the general section head of "Protection of Employee's Health; Duty to Furnish Food, Clothing, or Shelter." And the first paragraph refers to the fact that most States have now passed statutes which provide when men are



away from their place of residence the law of protection provides that the employer furnish him food, clothing, and lodging in such a manner and by such means that it would be acceptable and be similar or equal to the type of living they had in their residence.

But, the second paragraph gives this point exactly: "If the contract of employment contemplates provision by the employer for food, clothing, and shelter for the employee, any neglect of the obligation thus assumed will render the employer liable for injuries sustained by the employee, or if the employer undertakes to provide for the employee he will be liable if he furnishes an unsuitable lodging place, impure water, or unfit food."

Under the terms of the contract, Your Honor, he has provided for that and he is liable. He can't go and hire somebody else to do the work for him and then get out of liability on that grounds. That man—that bull cook—or Gaasland, himself, became the agent of Haskell Plumbing [267] & Heating Company for the purposes of furnishing those lodgings—and for the purpose of furnishing those foods—in exactly the same sense as though he were a direct employee. Because it is one of the non-delegable duties and cannot be assigned. It is part of the written contract; it is part of his guarantee to these men. And he didn't fulfill it. And, therefore, he is liable regardless of who did the work.

Now, these are just the basic citations, Your Honor, which are brief. I am not going to take the time to go into them at this time. I ask, Your

Honor, on the basis of what I called your attention to now to overrule this motion, so that the trial may continue. This matter could have been gone into in far greater detail than—by eminent authority at the time. With this one further thought, Your Honor. If, if these men had chosen to sue Gaasland, and not Haskell, then counsel, or somebody else, would be in court showing that there was no contract with Gaasland—and no duty on Gaasland—and that would end it.

Mr. Bell: Your Honor, if they had—These cases that he refers to had no more to do with this lawsuit than the law of Arson.

The Court: I can't agree with that statement, Counsel. [268]

Mr. Bell: Well, I can. I think you will when you——

The Court: No, sir.

Mr. Bell: Because—now if he had furnished food—or caused someone else to furnish food, then, like he said he would in the contract, he would furnish them board and lodging. Now, just like he read that. If he had furnished them bad food—or had furnished them bad lodgings. They would have some complaint about it. Now if that was non-delegable, which I don't believe that part of it can be said. The only thing he'd be liable for if he was negligent in attempting to furnish quarters.

Now, supposing he was traveling through the country—now just to see why I say this has nothing whatsoever to do with this case. Suppose he went into the nicest hotel in this town, and he had those

men with him, and he took them to a nice place, and they got food poisoning. Do you suppose he would be liable—or would the hotel who served them?

The Court: Well, that is certainly beside the point.

Mr. Bell: Well, that is what happened here.

The Court: No.

Mr. Bell: Oh, yes. Somebody else caused some damages, Your Honor. I am not going to argue it. I just stand on it. [269]

The Court: Well, surely we will agree to this, Counsel. The obligation to furnish quarters—living quarters would manifestly include an obligation to heat those quarters. Surely it can't be disputed that to furnish quarters would mean just a shell—a place for them to live. It would have to be heated; a comfortable place to live. And that obligation appears from this contract. There appears to be evidence of negligence sufficient to establish a *prima facie* case. The only question which bothered me was the very one which you raised. Whether it was necessary to show definitely that this bull cook was an employee of Haskell, and that may be inferentially shown. It is doubtful whether it was definitely shown. But I am quite satisfied under the authorities cited by Counsel, which I do recall, as a rule, that it does make no difference, and that this bull cook must be held for the purposes required by this contract to be the agent of the Haskell Plumbing and Heating Company.

Therefore, the motion to dismiss will be denied.

Mr. Bell: Now, Your Honor, I have exception, please. Now, let's see. Does that cover motion to dismiss as to all of the remaining defendants involved in that motion——

The Court: That is the all remaining defendant. [270]

Mr. Bell: You dismissed one. Or plaintiff, I mean. Plaintiffs. You dismissed this as to Smith?

The Court: Well, yes.

Mr. Bell: This motion, then, which you are overruling now was directed against all of the plaintiffs. Now, Your Honor, I have depositions for the——

The Court: Now, wait a moment. You say my motion was directed against all of the plaintiffs?

Mr. Bell: Your order. My motion directed against all of the plaintiffs to dismiss the full amount—the whole thing.

The Court: Well, your motion was to dismiss against all of the plaintiffs remaining except Smith.

Mr. Bell: That is right.

The Court: Well, of course.

Mr. Bell: I just wanted to——

The Court: I so understood it. Yes.

Mr. Bell: I just wanted the record to be clear on that.

Now, Your Honor; I have two depositions to introduce in evidence, and I'll either read them at this time in their entirety, or I'll do it to suit you; anyway you want it done. Now, they are very definite and certain depositions. The originals are before you and I have copies of them here, and I presume

I better offer to read [271] them to you and let Mr. Butcher——

The Court: Now, would you suggest whether it would be all right for the Court to have them read. In a jury trial, of course, those things are essential, but in a non-jury case I have felt that it is discretionary with the Court, unless the parties insist that they be read, either party, that it is quite sufficient if they be introduced and read by the Court—to save time in court procedure. I certainly assure Counsel that I will diligently read them.

Mr. Bell: Well——

The Court: And unless either counsel insist that they be read, I would prefer to read them at leisure.

Mr. Bell: The only——

The Court: Because we have only about five hours of court time available, but I have every evening available, and I work every evening.

Mr. Bell: Well, Your Honor, that is perfectly all right with me. So long as you will consider them as fully before the Court in their entirety. And then I would make my motions to follow them——

The Court: Yes. Indeed I so agree, and I also agree to read them before hearing your argument in the case.

Mr. Bell: Well, possibly that would——

The Court: So, I could do that this evening.

Mr. Bell: Oh. All right. You have the originals there. [272]

The Court: Yes. They are here. You are offering them then at this time?

Mr. Bell: I am offering both——

The Court: Will you refer, specifically, then to which they are?

Mr. Bell: Your Honor, at this time I offer the deposition of F. Murray Haskell, a witness for the defendant taken in Whatcom County Courthouse, Bellingham, Washington. The original of which is on file there. And at this time I am offering——

The Court: Just a moment. Was that taken pursuant to notice or——

Mr. Bell: Yes.

The Court: ——by stipulation?

Mr. Bell: No, it was taken pursuant to notice.

The Court: Then, I think you should also be required to show whether or not, under the Rule, that this man is available or within 100 miles of this trial?

Mr. Bell: That is shown in the——

The Court: Is it shown?

Mr. Butcher: I will stipulate in any event, Your Honor, that he is in Bellingham, Washington.

The Court: Very well.

Mr. Bell: But he does testify that he can't be here [273] at the trial, and he does live there.

The Court: All right. He is over 100 miles away, today. But it is so stipulated. Very well.

Mr. Bell: Then, we offer the one of Douglas Blair, under the same set of circumstances.

Mr. Butcher: I will also stipulate that he is also in Bellingham, Washington, at this time.

The Court: Very well. Then the depositions of

Douglas Blair and F. Murray Haskell are admitted in evidence.

Whatcom County Courthouse, Bellingham, Washington, December 29, 1954.

\* \* \* \* \*

DOUGLAS BLAIR,

a witness named in the annexed Notice, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination

By Mr. Ehrlichman:

Q. Will you state your name, sir?

A. Douglas Blair.

Q. And what is your home address?

A. 2814 Lyle Street, Bellingham.

Mr. Gemmill: L-y-l-e?

The Witness: Yes.

By Mr. Ehrlichman:

Q. And what is your present occupation?

A. I am an accountant for Campbell Investment Company.

Q. In the city of Bellingham, Washington?

A. Yes.

Q. And you understand that the trial of this action will be in Alaska in the early part of January, do you?      A. I hadn't known that.

Q. Would it be possible for you to attend the trial of this action in Anchorage in the month of January?

(Deposition of Douglas Blair.)

A. It would be practically impossible for me to do so.

Q. And what is the reason for that?

A. Because I am the only person employed by Campbell Investment Company. I am maintaining twelve to fourteen different sets of accounts which have to be closed and tax returns prepared immediately after the close of the year.

Q. Now directing your attention to a Gaasland Construction Company job at King Salmon, or Naknek, Alaska, are you familiar generally with that enterprise of the Gaasland Construction Company? A. Yes, I am.

Q. During that job were you employed by the Gaasland Construction Company?

A. Yes, I was. I was assistant secretary and acting as office manager and accountant for Gaasland Company during that period.

Q. In that capacity what did you do with relation to that Naknek job?

A. I saw, to the best of my knowledge, all, substantially all, correspondence relating to the job. I saw all payrolls, subcontract agreements, and processed all the bills. I also actually visited the job site.

Q. As I understand it, Gaasland Construction Company was the prime contractor on that job, is that right?

A. That is correct. It is, however, Gaasland Company, Incorporated.

Q. That is the correct——



(Deposition of Douglas Blair.)

A. (Interposing) That is the correct name.

Q. —(continuing) chartered name?

A. Yes.

Q. I see. And there were a number of subcontractors, including Haskell, is that right?

A. That is correct.

Q. Now what was the arrangement between Haskell and Gaasland Companies regarding the board and lodging of Haskell's employees at Naknek?

A. The arrangement was that Gaasland Company should operate a camp where room and board would be furnished to their own employees, those of Haskell Plumbing & Heating Company, as well as those of other subcontractors on the job.

Q. Did these various subcontractors, including Haskell, have any direct hand in the management of that boarding and lodging camp?

A. None whatsoever.

Q. Whose employees operated that boarding and lodging camp?

A. The employees of Gaasland Company, Incorporated.

Q. And to whom did the hut belong which burned in October of 1951 in which these plaintiffs were lodged?

A. I wouldn't state to whom it belonged. The camp proper belonged to the C.A.A., was leased by them to the Alaska Salmon Industry, and with the permission of the C.A.A. by the Alaska Salmon Industry to Gaasland, so that Gaasland was not the

(Deposition of Douglas Blair.)

owner of any of the buildings. However, all of the buildings were operated by and under the jurisdiction of Gaasland Company.

Q. Who hired the camp steward?

A. We hired the camp steward, the cooks, the bull cooks, and any other personnel working in the camp.

Q. Who inspected and maintained the Quonset huts in which the subcontractor's employees lived?

A. All of the camp was inspected and maintained by Gaasland Company. I would assume the inspections to be made by the camp manager.

Q. And who was that in October of 1951; do you recall?

A. I believe it to have been Lee Post, who was camp manager there. The previous camp manager was named Joe Nord, but I believe that he was gone and had been replaced by Post at that time.

Q. Now, you used the expression "bull cook." What is a bull cook?

A. The bull cook was an employee who cleaned quarters, made beds, changed linen, and was generally responsible for keeping the camp and quarters in a neat orderly condition.

Q. Who purchased the groceries that were eaten by the plaintiffs and the other subcontractors' employees?

A. Gaasland Company.

Q. And who purchased the fuel oil which was burned to keep the Quonset huts warm?

A. Gaasland Company.

(Deposition of Douglas Blair.)

Q. And do you know what kind of fuel was burned in the Quonset hut in question?

A. No, I do not. To the best of my knowledge all of them were heated by stove oil supplied by the Standard Oil Company of California at Naknek. It was barged up river to the job.

Q. Was there a written contract between Haskell and Gaasland providing for the lodging and boarding of these plaintiffs and the other Haskell employees?

A. To the best of my recollection there was no such agreement.

Q. What was the arrangement?

A. As I recall, one of the provisions of the agreement with Haskell Plumbing & Heating Company was that they should be compensated for all of their costs in connection with their subcontract, and that they should receive a certain additional amount over and above the costs. There was, therefore, no object in Gaasland Company's billing subsistence and quarters to Haskell only to have Haskell bill them back to Gaasland Company. That, to the best of my recollection, explains the absence of any agreement as to a specific amount to be charged.

Q. Gaasland just picked up the check as it came along?

A. That is correct.

Q. I see. To your knowledge did the Haskell Company at anytime undertake the inspection and maintenance of the Quonset hut in question prior to the time of the fire?

A. I am sure they did not.

Mr. Ehrlichman: That is all I have.

\* \* \* \* \*

[Endorsed]: Filed Jan. 3, 1955.

Whatcom County Courthouse, Bellingham, Washington, December 29, 1954.

\* \* \* \* \*

F. MURRAY HASKELL

a witness named in the annexed Notice, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination

By Mr. Ehrlichman:

Q. What is your name?

A. F. Murray Haskell.

Q. And your home address?

A. 905—wait. 622 Briar Road.

Q. In what city?

A. Bellingham, Washington.

Q. And what is your occupation, sir?

A. Plumber-owner.

Q. You are associated with the Haskell Plumbing & Heating Company, Incorporated?

A. That is correct.

Q. What is your position with that company?

A. At the present time, vice-president.

Q. And what was your position with that company in November of 1951?

A. I was acting secretary then.

Q. And were you active in the management of that company?

(Deposition of F. Murray Haskell.)

Mr. Gemmill: You mean October, '51, the time of the fire?

Mr. Ehrlichman: Yes. Did I say November?

Mr. Gemmill: Yes.

Mr. Ehrlichman: I meant October.

By Mr. Ehrlichman:

Q. You were secretary in October of 1951 too?

A. That's right.

Q. And did you have an active part in the management of that company at that time?

A. Yes, I did.

Q. And for a year prior thereto?

A. That's right.

Q. Do you understand that the trial of this action is to take place in Alaska on January 5th of 1955?

A. Yes.

Q. Is it possible for you to be present at the trial of that action?

A. No.

Q. Why not?

A. Because of other business obligations and negotiations down here.

Q. You will not be in Alaska at that time?

A. No, I will not.

Q. Now, Mr. Haskell, directing your attention to a fire which took place in Naknek, Alaska, on October 11th, 1951, are you familiar with the Quonset hut which was involved in that fire?

A. Yes.

Q. I will ask you whether that Quonset hut was the property of the defendant corporation at the time of the fire?

A. No, it was not.

(Deposition of F. Murray Haskell.)

Q. Do you know to whom that hut belonged?

A. To Gaasland Construction Company.

Q. And had that hut ever belonged to the Haskell Plumbing & Heating Company, Incorporated?

A. No, sir.

Q. Had the Haskell Plumbing & Heating Company, Incorporated, ever undertaken the maintenance of that hut and its equipment?

A. No, sir.

Q. Do you know who was living in that hut at the time of the fire?

A. The plumbers that we had hired for that job.

Q. And what arrangement had been made for their lodging prior to that fire?

A. On the starting of the job we brought the men in from Anchorage. There was no housing facilities available with the exception of a place they called the Sky Motel.

Q. And where was it located?

A. Approximately a mile from the job site.

Q. In Naknek? A. In Naknek.

Q. And who operated that Sky Motel?

A. It was an individual that catered in that type of business.

Q. Was it anyone associated with your company? A. No, sir.

Q. Or the Gaasland Construction Company?

A. No, sir.

Q. It was an independent concessionaire, is that right? A. That's right.

(Deposition of F. Murray Haskell.)

Q. And who paid the bills for the lodging of your men at that Sky Motel?

A. Gaasland Construction Company.

Mr. Gemmill: The which Construction Company?

The Witness: Gaasland.

By Mr. Ehrlichman:

Q. And were the bills from the Sky Motel for that lodging sent to your company or to Gaasland?

A. They were sent to Gaasland Company.

Q. Direct? A. Direct.

Q. When was it that your men ceased to be lodged in the Sky Motel and started living in this Quonset hut?

A. As soon as quarters were made available. To my recollection, I believe they stayed in there approximately, I would say, in the neighborhood of two months.

Q. And who made the Quonset hut available to them?

A. Gaasland Construction Company.

Q. Do you know who operated the eating or messing facilities at which these men ate while they lived in that Quonset hut before the fire?

A. Gaasland Construction Company arranged for all eating and rooming for all subcontractors.

Q. I see. And what was the arrangement for compensation to the Gaasland Construction Company for those facilities?

A. We purchased the facilities by the man-day on the general contractor, which was Gaasland Con-

(Deposition of F. Murray Haskell.)

struction Company, as did all the other subcontractors on the site.

Q. In other words, you say you purchased them by the man-day. Did you pay a unit rate per man for board and room? A. That's right.

Q. And these facilities were then provided by Gaasland, is that right? A. That's right.

Q. And who undertook the maintenance and upkeep of the building in which these men were lodged?

A. Gaasland Construction Company hired all the personnel to take care of it—eating, housing.

Q. And did they also provide the upkeep for the hot water heater and heating facilities in those huts? A. That's right.

Q. Now, I will ask you whether at anytime during the period between the time the men left the Sky Motel and the time of the fire, at anytime during that period, did the Haskell Company provide or maintain housekeeping facilities?

A. No, sir.

Q. For any of these men? A. No, sir.

Q. Did you have any staff which provided lodging or messing facilities for any of your people?

A. No.

Q. Did you have any bull cooks in your employ?

A. No, because the cost would be prohibitive for an individual under a small crew to come in and set up facilities of that nature.

Q. So you retained an independent contractor to do that for you, is that right? A. Yes.



(Deposition of F. Murray Haskell.)

Q. And that contractor was the Gaasland Construction Company, is that correct?

A. That's right.

Mr. Ehrlichman: I think that is all I have.

\* \* \* \* \*

[Endorsed]: Filed Jan. 3, 1955.

Mr. Bell: Now, Your Honor, with those depositions in—the defendant will rest—and will want to renew each of the motions above made at this time, with as full force and effect as if I stated them all over, and if you will consider them as made in full at this time, I'll not take up your time to restate them, but if you'd rather, I will do so.

The Court: What you mean is you are asking the Court now to consider them in connection with the final decision in the case?

Mr. Bell: Yes——

The Court: Surely we need not go into the matter of arguing them again.

Mr. Bell: Well, may I make the motions then, after we've rested then; then I won't argue the case at [274] all. At this time the defendant moves to strike all of the testimony as to both the oral testimony and the interrogatories that are before the Court. That's number one. We moved also to strike the interrogatories in a separate motion for the reason that they are not admissible in evidence at all. Then, third, I move to dismiss the entire case for the reason there is no cause of action proven. With that then we will argue it at Your Honor's

convenience on those motions after you have had time to read the depositions and——

The Court: Well, the motions are directed against the plaintiffs' case. I see no reason that they can be properly renewed at this time. The whole questions will, of course, be considered at arriving at a final decision. The same questions that you raise, but the motions as such at this time will be denied.

Mr. Butcher: If Your Honor please, now, in connection with the depositions just received, and which I stipulated may be read by Your Honor. I have not read these depositions——

The Court: I was just going to ask about that.

Mr. Butcher: And I am going to ask Mr. Bell if he would lend me the copies that he has——

Mr. Bell: Sure.

Mr. Butcher: And, also, Your Honor, as in most depositions where they are taken outside the court, objections [275] to matters irrelevant, incompetent, immaterial, and other objections are made which are not ruled upon, and the witnesses go ahead and answer anyway, leaving it to the Court. And now, I would also like to state to the Court that if there are such motions, such objections, to the introduction of any question, or the answer to any question, that the Court rule upon himself at the time he reaches it, as to whether it should be received or not.

The Court: Well, there would be no record of that. Supposing we have to take this matter up and continue again in the morning. Supposing that there are any objections made in the depositions

which you wish to urge, supposing you present them tomorrow morning.

Mr. Butcher: That is satisfactory. Is that satisfactory to you? (To Mr. Bell.)

Mr. Bell: And may I do the same, Your Honor. If you please?

The Court: Yes, of course. Both parties.

Then comes the question, Counsel, for the plaintiffs—whether you may wish to offer any rebuttal—in answer to the depositions. I presume you would hardly be in a position to know at this time?

Mr. Butcher: It may be that I would want to talk to you about it, Your Honor.

Mr. Bell: That is all right. He has got a [276] right to. It will be all right with me.

The Court: But you would hardly be in a position to do so now, not having read the depositions?

Mr. Butcher: No, I couldn't do so now.

The Court: Very well. It seems then that is all that we can accomplish this afternoon. The case will be continued tomorrow morning, with the opportunity first to offer rebuttal, if so desired, or any sur-rebuttal which may develop. And then we will take up the arguments of counsel. And as suggested, I would much prefer to have an opportunity to wade through these depositions before hearing the arguments, naturally. And that I promised to do this evening.

Mr. Bell: All right. It is a big job, I know.

(Other business taken up at this point.)

Mr. Butcher: Then after the question is deter-

mined whether there will be rebuttal or not, we will go right ahead with the argument, then?

The Court: Yes. Well, I am thinking of another conflict on our calendar for the moment. We will probably have to take up the matter at ten o'clock. It no doubt wouldn't take over a half hour.

Mr. Butcher: The time for arguing is immaterial to me, Your Honor.

The Court: So, supposing—We ought to be able to resume this case by ten-thirty. So if that will be agreeable we will resume at ten-thirty, and adjourn court until ten tomorrow morning. We will resume this case at ten-thirty. There is nothing further at this time.

Court adjourned at 4:00 p.m.

On Friday, January 7, 1955 at 10:40 the following proceedings were had:

The Court: We will resume the trial in the case of Weeks and others vs. Haskell Plumbing and Heating. First, Counsel, I would like to say that last evening, I carefully read and studied the several depositions which were admitted in evidence late yesterday. That is, the remainder of the deposition of Jesse Hobbs, and all of the depositions of F. Murray Haskell, and Douglas Blair. I note that in the latter two depositions that it was stipulated by counsel taking them that all objections to the materiality or competency of the questions were reserved until the time of trial. But I also find that several objections were made. Therefore, it is necessary at this time that the Court hear any objections which counsel for either party may have to any

questions contained in either of these depositions and try and pass upon them.

Mr. Butcher: If Your Honor please, Mr. Bell was kind enough last night to lend me his carbon copy of [278] the deposition of Douglas Blair and the deposition of F. Murray Haskell. I have read them and I have also noted that occasionally there were objections made, and testimony allowed in spite of the objections and reservations also being made. But I find, Your Honor, that while perhaps, technically, the objections were sound on the part of both parties, they do not involve material evidence on testimony to a point where it would make any difference from my point of view. Therefore, I waive any objection; any testimony that was taken over the objection of Mr. Gemmill; anything that Mr. Gemmill objected to—that was testified to on behalf of either of these persons, either on cross or direct examination.

The Court: Very well. I note the fact that some of these objections made by Mr. Gemmill were moot. For example there appeared a long discussion with regard to one question asked of a witness, and finally the witness answered "I do not know." So, it is futile to pass upon any such objection. Do you have any, Mr. Bell?

Mr. Bell: Your Honor, I am in a position a great deal like Mr. Butcher. I have his copy of the deposition which he was kind enough to let me have, and I was so tired when I left here last night that I didn't read it—or get to read it. There were a lot of people waiting for me in the office, and I

didn't get to read it, but I did [279] work on it this morning, some. But like Mr. Butcher, many of those objections that are shown there, are matters that I would urge before a jury, but since the case is being tried before the Court, most of them are immaterial, because I fully believe that the Court will exclude from his mind any incompetent evidence, anyway. It is just natural for a lawyer to do that. And therefore I am not, at this time, going to urge—or I am not in a position to urge—or push any of those for objections. There is only the one on page 13——

The Court: That is Hobbs' deposition?

Mr. Bell: Mr. Butcher's deposition.

The Court: Well, the deposition of the witness Hobbs.

Mr. Bell: Hobbs, yes.

The Court: Page 13.

Mr. Bell: At the bottom, the answer was this: "Do you know who furnished that?"

With reference to "The bed and the bedding was furnished there, yes." and so on. It goes on and says that everything was furnished.

"Do you know who furnished that?"

"Well, as far as I know, Haskell was supposed to furnish it. He was supposed to furnish free room and board." [280] and then Mr. Ehrlichman objected, and the answer of course to the objection was not ruled on. He objected to the answer then. I take it that the answer means nothing anyway.

The Court: Well, it was not answered, Counsel.

Mr. Bell: Yes, he said it: "Well, as far as I

know, Haskell was supposed to furnish it.”

The Court: Oh, the objection followed the answer rather than the question?

Mr. Bell: Yes, it did. And he objected to the answer as not responsive. And that is the one I call your attention to. There were two or three times, if you remember that same—Well, every time Mr. Butcher asked practically the same question, and practically the same answer was, “They didn’t know who furnished it.” In their opinion or their understanding he was—that Haskell Plumbing and Heating was to furnish it. And it all depends on the construction of the written contract. And I don’t see any reason to argue about it.

The Court: Well, my attention was directed yesterday by Mr. Butcher to the rule on that particular type of objection, which I find to be correct; although in common practice it is violated; and that is that the objection that an answer is not responsive is available only to the party who asks the question. And I find that that is correct. [281]

Mr. Bell: Mr. Butcher showed me that same thing. I——

The Court: At least it is correct, according to the authority which he showed to me.

Mr. Bell: Yes, it is.

The Court: It is a matter which is commonly done. So, therefore, I would say that that objection is not obtainable, and must be overruled. If you wish to object upon other grounds, as to its competency or relevancy—that I think would be still permitted.

Mr. Bell: Well, I would object to it on the theory that it is incompetent, irrelevant, and immaterial, and calls for a conclusion of the witness; the question does, because it drew an answer that is based upon hearsay or conclusion. Even though the question—it might have been worded exactly right—it drew an answer that is not responsive, and is detrimental and prejudicial to the defendant's cause of action.

The Court: The question was, "Do you know..." And the answer was what was supposed to be done. To that extent I believe that the answer is incompetent, and the objection will be sustained upon that ground. Not upon the ground that it is not responsive.

Mr. Butcher: Your Honor, I didn't get a chance to be heard on that—— [282]

The Court: Oh, I am sorry. Did you wish——

Mr. Butcher: If Your Honor will recall, most of the plaintiffs who took the stand, testified that they had seen or heard—or seen, rather—because there were several copies of the contract available down there on the job—what was supposed to be furnished. Now, if——

The Court: Mr. Butcher. We have a written contract here on that. Why is it material as to what was supposed to be done?

Mr. Butcher: All right.

The Court: Is that the only one, Mr. Bell?

Mr. Bell: That is the only one on the objections.

The Court: Well, then we come now to rebuttal. Do you have any rebuttal, Counsel?



Mr. Butcher: I have no rebuttal testimony to offer, Your Honor.

The Court: Before proceeding to the argument in the case, there is something that the Court will require. I assume that the Court has such power—by way of additional evidence before we can determine all of the issues in this case; and that is the question of the element of damage. In examining the deposition of the witness Hobbs, I find that he bases his claim of damage almost exclusively upon replacement value of the articles lost. Similarly, the testimony of the one witness who we heard on this matter, Mr. Callaway, was to the effect that except for three items, I believe, the shoes, a top coat and a clock—that he based his claim upon replacement value. The Court is not at all satisfied that that is the proper measure of damage, and I would like to hear some more evidence on that point—

Mr. Butcher: (Indicated an interruption.)

The Court: Will you permit me to finish, Mr. Butcher. In my own experience, I do know that insurance companies have very definite rules as to such claims, which rule although not conclusive would be certainly persuasive in this court in determining what is the proper measure of damage. That is, I do know as to furniture or equipment—the rule is not replacement value—but replacement value less a reasonable allowance for use and depreciation. Now whether that applies to articles of clothing and personal effects, I do not know. But I should like to hear some evidence on it, and would suggest that the best evidence—although subject to

counsels' objections—the best evidence would be from some insurance adjuster who is skilled in these matters. I would like to ask that such evidence be produced.

Mr. Butcher: Well, then, Your Honor, may I reopen—let me make this suggestion, first before we proceed to argument, unless Mr. Bell objects. Let me reopen [284] the plaintiffs' case sufficient to call an insurance adjuster on that particular phase.

The Court: That's what I should like to do.

Mr. Bell: I would have no objection to that.

The Court: Very well. Do you wish to proceed to argument at this time as to the remainder of the——

Mr. Butcher: Does Your Honor feel that the whole matter should be argued including that item at one time or——

The Court: Well, that would be up to Counsel. We will hear it at this time except counsel might not like to argue the matter piece-meal.

Mr. Butcher: Would you rather argue after hearing the insurance adjuster or would you rather argue it now?

Mr. Bell: It doesn't make a bit of difference. It is your convenience and the Court's convenience. Either way. I'll argue it now or later; whichever either one of you two agree, is all right.

Mr. Butcher: Perhaps, if we could have a two or three minute recess, which will permit me to call one of several adjusters in town—there are several of them—I think they are all quite important

men. I could report back to the Court in about five minutes. I will find out when such a man could be here. [285]

The Court: Very well. We will take a recess then for five minutes.

(Thereupon the court recessed from 10:50 a.m., until 11:00.)

Mr. Butcher: If Your Honor please, I called three insurance adjusters, and two of them their phones didn't answer, sir. I called Mr. Lundquest, an adjuster, and he tells me that he could appear in court at two o'clock, but not before that because he has agreed to go to a fire this morning.

The Court: That would be most convenient to the Court, because we have an ex-parte matter at one-thirty which will probably be through by then, and nothing else until three-thirty. So, except for that time we can devote as much as is necessary to the trial of this case. So that would be fine. Now, then perhaps if you gentlemen are ready, we can proceed to hear the arguments on the case, with the exception of this issue of damage which can be reserved then until a later time.

Mr. Bell: I think that is all right, Your Honor. If you are going to sustain the motion to dismiss, there would be no need for the extra argument; and if you are not, why then that will——

The Court: Well, we have already denied the motion to dismiss. [286]

Mr. Bell: No. I thought you set it for argument this morning.

The Court: The motion to dismiss? No. The ar-

gument on the final—the final argument on the case. The evidence is closed, as I understand it. There is no rebuttal.

Mr. Bell: Well, the depositions were not read by—I——

The Court: Well, I understood it was agreed that the Court could read the depositions last evening, which I assured you I had done, reserving the right to make objections to any of it this morning, which has been done.

Mr. Bell: That's right——

The Court: Well, then all the evidence is in, as I understand it——

Mr. Bell: That's right. All of it is in. Now, I understood that you would hear my motion to dismiss——

The Court: A motion to dismiss would hardly be proper at this time, Counsel. I will hear the final arguments of counsel.

Mr. Bell: Well, if you overruled my motion——

The Court: Well, I overruled it three times, sir.

Mr. Bell: You overruled it at the close of the plaintiff's evidence but——

The Court: You renewed it again yesterday and we overruled it again——

Mr. Bell: And I have to renew it now since the depositions——

The Court: Well, you may do so.

Mr. Bell: All right.

The Court: Then it is overruled for the reasons assigned.

Mr. Bell: Well, let me make the record, then, Your Honor.

The defendant, after all of the evidence is in, with the exception of the testimony of a claim agent, as to determine the values of certain objects, the defendant now, moves to strike all of the testimony which—on the same grounds as that set up in the motion to dismiss—that was filed some time ago. I imagine you will want to rule each one of these separately, do you not?

The Court: This is a motion to dismiss on account of failure of the complaint to state a cause of action?

Mr. Bell: That's right. And a misjoinder of parties.

The Court: ——and a misjoinder of parties. For the reasons previously assigned, such motion will be denied. [288]

Mr. Bell: Now, then I move to strike the interrogatories on the theory that they are not—they were improperly introduced, and were not competent evidence.

The Court: For the reasons previously assigned, such motion will likewise be denied.

Mr. Bell: Now, I move to strike the Plaintiffs' Exhibit number one which is the contract referred to all the way through the case for the reason it is not signed or executed by any party whose name is in the body of the contract in any way, and purports to be a contract between the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the employers of the group named—we do not know at this time—in so far as this

lawsuit is concerned who originally executed this contract, which was dated the 18th day of August 1950. If the contract was ever executed, there is no executed contract before the Court between the parties whose names are mentioned as the makers of the contract, and the Union, itself. And it is only executed so far as the contract itself shows by F. M. Haskell, P-l-u-m-b and H-y-t Incorporated. F. M. Haskell. And I move to strike that because it is not binding on the parties here and is not available to—of any effect to the plaintiffs. [289]

The Court: For the reasons assigned at the time Exhibit One was admitted in evidence, and for the further reason that the execution of the contract is admitted in the depositions of the defendant, the motion to strike is denied.

Mr. Bell: Then I move to dismiss on the ground there is no competent evidence as to any damage suffered as the measure of damages has never been properly met, and there is no competent evidence of the value of the properties lost.

The Court: That must be denied at this time—reserving decision after we have heard the testimony requested by the Court.

Mr. Bell: Now, Your Honor, do you want me then to start the argument—I suppose the plaintiff will start the argument——

The Court: Well, I expect so.

Mr. Bell: ——because I have had my argument.

The Court: We will hear from the plaintiffs on final argument of the case. Now, as to the question of time, Counsel, the rule limits us to an hour on

each side. I presume that that would be agreeable and not too harsh in this case.

Mr. Butcher: That will be more than ample, Your Honor. I have a number of books here and I don't [290] intend to read them from cover to cover. If Your Honor please, has ruled on that last motion of Mr. Bell's, but by way of argument I would like to comment that the best person in the world to establish the value of the things he has lost is that person by reporting and testifying how much he paid for them, and the value to him. While third parties may be helpful in establishing values, they can never establish the true value.

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The Court: We will continue the case between Weeks and others and Haskell. Now, we interrupted your argument, Mr. Bell, at the noon recess. Do you wish to continue, or do you suggest that you were through?

Mr. Bell: Your Honor, let me see. I thought of something right at the time that I quit—I wanted to call your attention to the fact that Mr. Butcher has referred to.

(Mr. Bell continues with his argument.)

Mr. Butcher: The measure of damages——

The Court: Yes.

Mr. Butcher: Your Honor, the adjuster—for the property lost—and the type—he is here in court and I assured him that we [291] would put him on promptly, so that he could get back to his regular work. I would like, if the Court would be willing, and Mr. Bell consents, to call him now, and then

let me complete my argument on rebuttal after he leaves.

The Court: I was just going to suggest that.

Mr. Bell: I think that is a good idea.

### FLOYD A. LUNDQUEST

was called as a witness on behalf of the plaintiffs, was duly sworn and testified as follows:

#### Direct Examination

By Attorney for Plaintiffs:

Q. Will you state your full name to the Court?

A. Floyd A. Lundquest.

Q. And what is your occupation, Mr. Lundquest?

A. Insurance adjuster—primarily, fire.

Mr. Butcher: Mr. Bell, will you stipulate to Mr. Lundquest's qualifications as an adjuster, and an appraiser of property lost?

Mr. Bell: I will.

Q. Mr. Lundquest. Let me speak to you, and I will put a question to you which will give you an opportunity to say if there is a measure of damages: A group of men were located in a camp at King Salmon. They had equipment with them and clothes—personal effects—such as cameras, guns, wristwatches, electric razors, razor kits, suitcases, duffle bags, seabags, suits, dress suits, dress shirts, hats, belts, buckles, socks, dress shoes, work shoes, boots, galoshes, and similar items of that nature—too numerous to call your attention to. Hundreds of them for nine or ten men. Now, as an insurance adjuster, you are called upon to appraise miscellaneous household items, and miscellaneous items



(Testimony of Floyd A. Lundquest.)

of personal property; some of which was new, and some of which was used. Could you apply a measure of damages—a measure in evaluating that kind of property, without knowing exactly the age and use of each individual item. Is that possible?

A. Yes, it is possible.

Q. And, how would you do it?

A. Well, I would take into account the age of the individual, as for example, here in the Territory, the younger men with their income use it to buy good make cameras and watches and so forth. Whereas the older men don't disburse their funds that way. They are possibly married with a family and they need their funds for other purposes. A group of younger men very likely would have fishing equipment out there in the territory where fishing is plentiful. They would also have hunting equipment. I'd also take into account how long they had been in the Territory, and maybe finding that they had only been here for a few years, I possibly would apply depreciation of [293] about 15 or 20%; but very rarely over 33⅓%. It's very rarely that——

Mr. Butcher: In other words for items of this kind you would apply a measure of about 15% to——

Mr. Lundquest: ——33⅓% in the younger age group. In the older age group, those men very rarely have a suit of clothes; they have what you might call bush garments, and stuff like that for a construction job; but they don't spend their money on \$50 suits or \$80 suits or something like that.

(Testimony of Floyd A. Lundquest.)

They don't even have 'em. And I would take my depreciation then accordingly. And in the younger age group, I think an over-all, if you are going to spread it on an even keel—and be fair about it—would be  $33\frac{1}{3}\%$ —would be a fair deduction.

The Court: On which—on the younger?

Mr. Lundquest: On the younger group. The older you get the longer you had certain items. A man say who is 55 on a construction job, he may have had that rifle since he's been on the job, since he was a youngster.

Mr. Butcher: The testimony, Mr. Lundquest, in connection with the majority of the items is that a good many of the items were purchased that spring and summer for the trip; and some of the equipment, razors, and cameras had been purchased a year or two before. But most of it, I believe I am safe in saying, according to [294] the interrogatories and testimony, was in a fairly new condition.

A. Well, then I would deduct 20%, but possibly not over  $33\frac{1}{3}\%$ .

Q. Somewhere between 20 and  $33\frac{1}{3}\%$ ?

A. That is right.

Q. Depending on the use of it.

A. That is right.

Mr. Butcher: All right, then. That's all.

Mr. Bell: Now, I have some questions.

### Cross-Examination

By Attorney for Defense:

Q. Mr. Lundquest, one item in this, the evidence

(Testimony of Floyd A. Lundquest.)

will show, was a suit of clothes—a tailor-made suit—that was ordered and cost the man \$125.00 the year before. Now what would you feel that a suit of clothes of that age—a tailor-made suit—costing \$125.00 for—at the time. What would you consider a suit like that worth in adjustment?

A. I would say 50%, because it stands to reason that if a man has \$125.00 to buy a new suit—he has other suits hanging up in the wardrobe—one or more. And the very moment you bought a garment—it depreciates if you wear it down the street, once.

Q. And what about a top-coat—a tailor-made top-coat—that he ordered and paid \$85.00 for the year before?

A. Well, a top-coat is good for three years.

Q. And what would you consider the value of this tailor-made top-coat that cost him \$85.00?

A. I'd deduct a third.

Q. A third. Now, would that system follow through on shirts that cost thirty some odd dollars a piece—fancy shirts that cost, I believe the evidence shows, \$37.00 a piece. There were three of them for one man?

A. Well, those shirts are usually gabardine and they are usually tailor-made; taking the price of \$75.00 and due to that quality they most generally have to be dry-cleaned, and they are good for at least two years, without too much fading. After that you get quite a bit of fading in them.

Q. What would you normally feel right in de-

(Testimony of Floyd A. Lundquest.)

ductions on those shirts of that kind that were, say a year old?

A. Well, I'd want to take about 40% on a deal like that.

Q. Would you use that ordinary method in calculating losses, and do you use that ordinarily in calculating losses in this vicinity?

A. Yes, I do.

Mr. Bell: That is all.

Mr. Butcher: There is one further question on my part.

#### Redirect Examination

By Attorney for Plaintiffs:

Q. Mr. Lundquest, with reference to the \$125.00 suit. If this man spent most of the time in camp—in the bush [296] where he had no opportunity to wear it; he ordered it there from a salesman that came to the camp. He had only worn it a few times when he happened to go in town. Would that make any difference?

A. It would make some difference, but only to the point of taking his particular circumstances into account. In other words, I might deduct say a straight 50% depreciation, or a 40% depreciation. But that wouldn't really make him hold—with sufficient money to go out and even buy a ready-made suit of the same quality that he had when he paid \$125.00 for a tailor-made. I would try to give him enough cash and satisfaction so that he could go out and buy a ready-made suit. He would certainly be entitled to that.

(Testimony of Floyd A. Lundquest.)

Q. Then if he just purchased a suit, would you give the full value?

A. I would in that case.

Q. Then, if you took all these items that I mentioned and apply that measure—which I believe was between 20 and 33⅓%. You feel that would be fair?

A. I do.

The Court: Mr. Lundquest, Mr. Bell asked you a question which was almost what I had in mind, but not quite. He asked if this was the ordinary method which you used in calculating fire losses. Now, could you tell us whether or not, to your knowledge, that is also the ordinary method that [297] is generally used. In calculating fire losses?

A. Well, yes. I have been in the business twenty-five years this coming August first; and I went through the Industrial School in Chicago, and I also go by the National Bureau of Standards when it comes to quality of materials. Not all materials will take dry cleaning or laundry as other materials; so, I go by the Bureau of Standards. With household effects, I take into account locality. If you have got a lot of moths around, it stands to reason if you have a mohair davenport and a fellow says he has owned it fifteen years, and the mohair—and the moth processing is only guaranteed for five—it stands to reason that when that mohair davenport had a loss on it at the age of fifteen, it wasn't in too top condition. So——

The Court: Do you count this as well as the loss according to insurance practice based upon

(Testimony of Floyd A. Lundquest.)

replacement cost less reasonable use or depreciation—or on original cost?

A. Replacement cost.

Q. Replacement cost?

A. Because you can't take advantage of the market just because you happen to know somebody that you can buy—well go down the street and buy a suit of clothes that is on sale for \$39.50—that normally sells for \$79.50. Well, I have no right after you have a fire a week later to tell you that that suit was only worth \$39.50, because now the sale is over and it is going to [298] cost you \$79.50 to replace it. So I go by on replacement.

The Court: That is the general practice, is it not?

A. Yes, it is.

Q. Thank you.

The Court: Any further questions?

Mr. Bell: No, none.

The Court: Well, thank you.

Mr. Butcher: Thank you, Mr. Lundquest.

(Mr. Lundquest was excused and left the courtroom.)

The Court: We will hear from counsel for the plaintiffs in rebuttal argument. We are still supposed to be allowed an opportunity for any comments which you wish to make upon this additional testimony regarding the measure of damages and the loss ratio. Do you wish any comments on that testimony, by either party?

(Mr. Butcher then addressed the Court.)

The Court: Very well.

I feel that the Court is as well informed now to announce a decision on this case as I would be if I had reserved decision. I did have an opportunity to go into the authorities cited by counsel during the noon recess, together with some which my own research had developed, except for the two cases which were still here on the desk [299] which, of course, I did not find in the library—and did find one additional case in support of counsel's contention with regard to the principle of liability not being delegated, although it doesn't directly involve an employer liability, and that is the case of *Malone v. Jones*, 139 Pacific, 387. Now, touching first upon the contract. There is no question in the opinion of the Court but that the defendant Haskell Plumbing and Heating Company is bound by its employer contract with the Union representing these plaintiffs to furnish them with suitable living quarters. There is a definite contractual obligation. Now it is argued that is as far as they need go—to furnish them a place to live; they don't have to furnish a safe place to live. I cannot agree with that contention. The rule is pretty well stated in 35 *American Jurisprudence*, page 570, that the employer does not fully and finally discharge himself from liability to employees by furnishing suitable tools, machinery, and appliances; and I think possibly a stove may be considered an appliance. He is bound to see that his instrumentalities are maintained in a safe condition. He must exercise reasonable and proper watchfulness as to their condition, and guard against dangers which are likely to arise

from their use. Now, that is clearly a good statement of law. Truly, the employer is not an insurer, but he does have an obligation [300] to furnish not just quarters but safe quarters, and an obligation to see that any appliances, such as heating stoves in those quarters, are properly maintained and used.

Now, as to the fire! We have evidence that an improper use of fuel was used by the bull cook—and I'll come in a minute to the question of by whom he was employed. Well, it was discovered by one of these men that five gallons of gas were being mixed with 50 gallons of diesel oil. We have the positive evidence of an expert chemist along such lines that such practice is dangerous—is obviously dangerous; and it could cause an explosion. We have even evidence to the effect from Mr. Krupa that the flash point of such fuel is lowered from 140 degrees to 90 degrees by adding only 2% of gasoline. The amount that is added here was considerably more than that. We also have evidence that anything under 100% is dangerous; its unsafe; therefore, it could cause an explosion. We have evidence of a severe, intense fire, almost immediately consuming this large Quonset hut, to such extent that none of the men who were working on the job not more than a mile-and-a-half away could reach it in time to get into the building. We have evidence of the force of an explosion, or fire, at least, bursting out of both ends of the building. Obviously an explosion would cause that type of fire. We have evidence from two of these men that following the fire they found [301] one of these stoves with a



drum—which is inside of the stove—split apart. And from one of the men that it was lying some little distance from the base upon which it had sat. All of this taken together—from all of this, the conclusion is inescapable that the fire was caused by an explosion and that the explosion was in turn caused by the negligence of this bull cook. We also have evidence that this practice was reported to the superintendent of the Haskell Plumbing and Heating Company; whether he did anything about it or not does not appear except that obviously nothing was done or else the explosion would not have happened. Therefore there is evidence of negligence causing the damage to these plaintiffs in the loss of their personal effects and clothing.

Then we come to the question of who is responsible for that damage. Other things being equal there would be no argument, of course, but what the employer who agreed to furnish the quarters would be so liable. The defendant claims in his deposition that it is not liable because it, the corporation employed—not employed but made an arrangement with the general contractors—the Gaasland Company—to take care of all of this board and room which they were obligated to furnish. It seems that they had a cost-plus contract, and that all of their costs were to be paid by Gaasland, and therefore Gaasland, who was maintaining [302] a camp, agreed to provide these accommodations. Now, it is argued that that entirely relieves the employer from this responsibility—but I fully concur with the position taken by counsel for the plaintiffs that under the law such responsi-

bility cannot be so delegated; that this is the type of liability which an employer or anyone else cannot relieve himself by simply passing it on to someone else. And the fact, if you please, that the superintendent of Haskell Plumbing Company, Mr. Ferer,—if it be true that he did report it to Gaasland, it makes the situation worse and not better, because again they are trying to escape responsibility, and to use the common phrase “pass the buck,” but that is not permissible under the law. I agree with counsel that no suit could be maintained against Gaasland Construction Company for these damages. The doctrine that such responsibility cannot be so delegated is set forth in a great many authorities, most of which have been cited by counsel, together with the case which I mentioned. The liability springs from the wrong, and that is the fundamental question here. The wrong in this case may not be one of commission—it may be said that Haskell Company and its employees did not put this gas in the oil—but it is one of omission. It was the duty of the Haskell Company to see that these premises were safe, and when informed of a dangerous situation to see that that situation [303] was immediately corrected, which obviously was not done. Therefore, I find that the defendant is liable for this damage. Whether they may have recourse against the Gaasland Construction Company is not for me to determine, but possibly they have.

We then come to the question of the measure of damage. As suggested previously, I do not think it would be consistent with general practice, or law, to

allow in such a case the full amount of the replacement cost of these items. Naturally, and equitably, some allowance should be made for use and depreciation. Taking the testimony of Mr. Lundquest as to the ordinary method used in calculating insurance losses, which I believe to be as suggested, authoritative, if not controlling, it appears that there should be deducted somewhere between 20% and 33% or some cases as high as 40 or 50% allowance for depreciation. Now it would be a gigantic task for the Court to go through each item here of the nine plaintiffs—several hundred of such items—and try and determine in each specific item just how much depreciation should be allowed. I do not think that there is any such duty imposed upon the Court, and about the best that we can do is arrive at some fair average. Now this may hurt some who have a suit that was only a year old or maybe just purchased as against others who had fishing tackle that they had for three years, but [304] it is about the best that we could do in such situation and I think would be fair and equitable. And taking that—or taking the use testified to by Mr. Lundquest, and considering the age of the majority of this group, and considering that some of them took new things, and considering that most of them took practically all their things, I would say that an allowance of—well, I am rather undecided between 25 and 30%. 30% would more near approximate the figures given by Mr. Lundquest, particularly in that some may be 40%—and some 50—and some 15—and some 20. I believe that that is the best that

the Court could arrive at as a fair average—would be 30%—to be deducted for use and depreciation, as an average.

Therefore, it is my opinion that the plaintiffs are entitled to judgment against the defendant for the amounts prayed for in each case, as to which there is no substantial dispute, less an average allowance of 30% for depreciation and use, and together with their costs, and together with an attorney's fee to be computed in accordance with Rule 45.

Findings of fact, conclusions of law, and judgment may be entered accordingly.

[Endorsed]: Filed April 4, 1955.

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## PLAINTIFFS' EXHIBIT No. 1

### PIPE TRADES AGREEMENT

Between the Plumbing-Heating and Piping Employers of Anchorage, Alaska, and Local No. 367 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe-Fitting Industry of the United States and Canada.

This Agreement, entered into this 18th day of August, 1950, by and between the Plumbing-Heating and Piping Employers of Anchorage, Alaska, signatory hereto, hereinafter referred to as the Employers, and the United Association of Journeymen and Apprentices of the Plumbing and Pipe-Fitting Industry, Local No. 367, of the United States and Canada, in behalf of its members, hereinafter re-

## Plaintiffs' Exhibit No. 1—(Continued)

ferred to as the Union or Local No. 367, Witnesseth:

Whereas, it is the desire of the Union and the Employers to establish minimum rates of pay, uniform hours of employment, and working conditions on an area basis for the members of the Union employed by the Employers, and

Whereas, it is the desire of the parties hereto to provide, establish, and put into practice effective methods for the settlement of misunderstandings, disputes, or grievances between the parties hereto, to the end that the Employers are assured continuity of operation and the members of the Union are assured continuity of employment, and industrial peace is maintained and the business of the industry efficiently increased.

Now, Therefore, in consideration of the premises and of the respective covenants and agreements of the parties hereto, each of which shall be independent, It Is Hereby Agreed:

## I. Work Covered

(A) That this Agreement shall apply to and cover all Members of the Union employed to perform or performing all plumbing, heating, and piping work, as defined in the schedules attached hereto.

(B) That the jurisdiction of Local No. 367 shall cover the mainland of Alaska, from the 64th latitude north to the 58th latitude south. From the 142nd longitude east to the 168th longitude west or all that territory from Anchorage to a point half

## Plaintiffs' Exhibit No. 1—(Continued)

way in any direction to the nearest U. A. Local Union.

(C) That all work performed by the Employers, and all services rendered for the Employers, as herein defined, by the members of the Union, shall be rendered in accordance with each and all of the terms and provisions hereof.

(D) That if the Employers, parties hereto, shall sub-contract work as defined herein, provision shall be made in each sub-contract for the observance of said sub-contractor of the terms of this Agreement. A sub-contractor is defined as any person, firm or corporation who agrees under contract with the prime Contractor or his sub-contractor to perform any part or portion of the work covered by the contract, including the operation of equipment, performance of labor, and the furnishing and installation of materials.

(E) That so far as it is within the control of the Employer or his sub-contractors all materials, supplies and equipment used on the job shall be transported to or from the site of the work by members of the appropriate Craft Union. Nothing herein contained shall be construed to prohibit the normal delivery of freight by railroad.

(F) That, if the Employers, parties hereto, should contract work outside of the area covered by the terms of this Agreement, they may employ members of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting

Plaintiffs' Exhibit No. 1—(Continued)

Industry under the terms and conditions of the Local Union in whose territory the work is located.

II. Union Recognition

(A) That the Employers hereby recognize the Union which is signatory hereto as the sole and exclusive collective bargaining representative of those journeymen and apprentices employed by the Employers signatory hereto over whom the Union has jurisdiction, as such jurisdiction is defined by the Constitution of the United Association of Journeymen and Apprentices of the Plumbing and Pipe-Fitting Industry of the United States and Canada.

(B) That during the term of this Agreement, and during the performance by the Employers of any work or contract to which this Agreement relates, all employees covered hereby shall be or shall become members within 30 days after date of employment and shall remain members in good standing of the Union on whose behalf this Agreement is executed, as a condition of their employment.

(C) That in the employment of journeymen for all work covered in this Agreement, the following provisions subject to the conditions of Section II, A, above shall govern.

1. That the Employers shall call upon the Union or their Representative for such men as they may from time to time need, and the Union or their Representative shall furnish to the Employers the required number of qualified, competent and skilled mechanics of the classifications needed by the Em-

## Plaintiffs' Exhibit No. 1—(Continued)

ployers. Reasonable advance notice (but not less than twenty-four (24) hours) will be given by the Employers to the Union or their Representative upon ordering such mechanics, and in the event that forty-eight (48) hours after such notice the Union or their Representative shall not furnish such workmen, the Employers may employ men procured from the United Association.

1-b. Should the Employers request the Union to procure members of other Local Unions at any particular time or for any particular job, the Union will make every effort to do so; and the Employers agree to provide ninety (90) days' employment for such Members and to pay their return transportation fare to their point of hire. However, should, through no fault of the Employers or due to circumstances beyond their control, ninety (90) days of employment not be provided to such Members; the transportation fare of such requested Members shall be paid both ways by the Employers.

2. That the Employers may select one journeyman member of the Union in each classification, and such member may be sent to install work in the jurisdiction of a sister local union, and he shall be free to work with the tools if he so desires.

3. That the Union is only obligated to furnish men upon the work within the Schedule as signed by the Employers.

(D) That whenever reference is made in this Section II to the Representatives of the Union, such



Plaintiffs' Exhibit No. 1—(Continued)

reference is intended to designate the Representative of Local No. 367.

III. Strikes, Lockouts, Jurisdictional Disputes

(A) That all jurisdictional disputes between the Union and any other Union affiliated with the American Federation of Labor shall be determined in the manner and by the procedure established by the Building and Construction Trades Department of the American Federation of Labor, and Constitution and By-Laws of the U. A.

(B) That if a signatory Employer is performing work on a job as a sub-contractor, during the construction of which, such job is declared to be unfair by a Building and Construction Trades Council, and the work thereon is stopped for that reason, neither the Councils nor the signatory Union shall be deemed to have violated this Agreement, if, during the period of said stoppage of work, the members of such Union fail to perform their work on said job for the Contractors.

(C) That, the Union shall refrain from any strikes or slowdown due to jurisdictional or any other disputes, nor shall the Employer take any action to lock out the Members of the Union during the term of this Agreement.

(D) Nothing contained in this Agreement or in any part thereof or in this Section III or any part thereof shall affect or apply to the Union signatory hereto or on whose behalf this Agreement is executed, or any of them, in any action they may take

Plaintiffs' Exhibit No. 1—(Continued)  
against any Employer who has failed, neglected or refused to comply with or execute any settlement or decision reached through arbitration under the terms of Section V hereof.

#### IV. Classifications

(A) That all apprentices shall be employed in accordance with the apprentice standards as adopted by the Union under Federal Apprentice Training Program as drawn up and signed by the Joint Apprenticeship Committee and the U. A.

#### V. Procedure for Settlement of Grievances and Disputes

(A) A craft steward shall be a journeyman member of Local No. 367 appointed by the Union, who shall in addition to his work as a journeyman be permitted to perform during working hours such of his union duties as cannot be performed at other times. The Union agrees that such duties shall be performed as expeditiously as possible and the Employers agree to allow craft stewards a reasonable amount of time for the performance of such duties. The Board of Arbitration shall have the authority to determine what constitutes a reasonable amount of time for the shop steward to perform his duties. The Union shall notify the Employer of the appointment of each craft steward and the Employer, before laying off or discharging a craft steward, shall notify the Union of his intention to do so. It is recognized by the Employers that it is desirable

## Plaintiffs' Exhibit No. 1—(Continued)

that the person appointed craft steward remain on the job as long as there is work in his particular craft or trade. In no event shall an Employer discriminate against a craft steward or lay him off, or discharge him on account of any action taken by him in the proper performance of his Union duties.

(B) That the craft steward is to receive grievances or disputes from members of his Craft and report them to his business representative or special representative who shall then attempt to adjust said grievances or disputes with the Employer or his representative performing the work. At the same time, said business or special representative shall notify the Plumbing, Heating and Piping Employers of said grievance or dispute.

In the event that such a dispute cannot be adjusted in this manner within a reasonable length of time after complaint has been submitted, same shall be referred to the Arbitration Board hereinafter provided for. This Board shall convene not later than two days after the dispute has been referred to said Arbitration Board. The final decision must be rendered within three (3) days, after the complaint is submitted to arbitration, unless an extension of time is mutually agreed to by the parties hereto.

It is specifically agreed that the terms and conditions of this Agreement shall be binding upon such board of Arbitration and that it shall have no authority to alter, amend or revise the wages, hours and other conditions set forth herein, it being the in-

## Plaintiffs' Exhibit No. 1—(Continued)

tent that such Board's authority and decision shall be within the scope and limited to the application of terms and conditions hereof. The parties hereto agree that a decision rendered by a majority of the Arbitration Board shall be final and binding upon them, provided such decision is made within the time prescribed herein.

(C) All disputes between the parties regarding the interpretation or performance of any of the terms or conditions of this Agreement shall be submitted to arbitration in the manner provided in this Section.

(D) In the case of negligence on the part of members of Local No. 367 which leads to the loss of the Employer's tools the Board of Arbitration shall have the power to assess such member a fair cost.

## VI. Joint Conference and Arbitration Board

(A) Within thirty (30) days after the execution of this Agreement, the signatory Employers shall appoint their representatives, and the Union shall appoint an equal number of representatives as members of a Joint Conference and Arbitration Board. Their meeting dates shall be mutually agreed upon by themselves. This Board shall meet four (4) times each year to review the operation of this Agreement, labor supply, and general technical and economic conditions of the Plumbing-Heating and Piping Industry, and make recommendations to the parties which will be beneficial to the Industry and the general public.

## Plaintiffs' Exhibit No. 1—(Continued)

## VII. Fabrication

(A) All work performed in the production or fabrication of Plumbing or Piping materials shall be subject to the terms and conditions of this Agreement.

(B) The Employers agree to employ journeymen members of the signatory Union in the fabrication of all plumbing and piping materials.

## VIII. Shift Work

That on Projects, where the nature of the work requires the working of Members of the Union on a shift basis, the arrangements shall be determined by the Joint Conference and Arbitration Board, provided that no shift work shall be started unless there are at least five (5) days' work for each shift, eight (8) consecutive hours, exclusive of lunch period, between 8:00 a.m. and 5:00 p.m., shall constitute the first shift worked, the second or swing shift shall be paid at the rate of eight (8) hours pay for seven (7) hours worked, the third or graveyard shift shall be paid at the rate of eight (8) hours pay for seven hours worked.

## IX. Term Termination and Renewal

(A) That the term of this Agreement shall commence on the 18th day of August, 1950, and continue until the 1st day of March, 1952, and for additional periods of one year thereafter with the proviso that should either party desire to modify any portion or any of the terms hereof, it shall notify the other

## Plaintiffs' Exhibit No. 1—(Continued)

party in writing not less than sixty (60) days prior to the expiration date of this Agreement.

(B) That if the parties hereto fail to agree within sixty (60) days after the beginning of negotiations upon any portion of this Agreement it may be cancelled by either party signatory hereto.

## X. Working Conditions

1. (a) Eight (8) consecutive hours, exclusive of lunch period, between 8:00 a.m. and 5:00 p.m. shall constitute a day's work. A work week shall consist of five (5) days, Monday, Tuesday, Wednesday, Thursday, Friday. The first eight consecutive hours on Saturday, exclusive of lunch period, between the hours of 8:00 a.m. and 5:00 p.m. shall be paid for at the overtime rate of one and one-half times the regular straight time rate.

(b) Between May 1, and November 15, of each year; the first hour of overtime after the regular work day shall be paid for at the overtime rate of one and one-half times the regular straight time rate.

(c) Between May 1, and November 15, of each year; the first two hours of overtime after the regular work day shall be paid for at the rate of one and one-half times the straight time rate on isolated jobs where subsistence is required.

(d) All other overtime shall be paid for at the overtime rate of two (2) times the regular straight time rate, except as provided in Paragraph VIII.

2. (a) Any member of Local No. 367 working outside the incorporated city limits of Anchorage

## Plaintiffs' Exhibit No. 1—(Continued)

shall receive a transportation allowance of \$3.50 per day, except where the work day starts and ends at the camp, shop or Anchorage city limits within the regular eight hour day.

(b) When transportation is furnished by Employer it shall be safe and lawful; the men seated in reasonable comfort and protected from the elements.

3. Adequate shelter shall be provided for the men by the Employers in which to dry their clothes and eat their lunches.

4. The holidays recognized by the Building Trades Council shall be observed under this contract. These consist of New Year's Day, Lincoln's Birthday, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Alaska Day, Armistice Day, General Election Day, Thanksgiving Day and Christmas. If any of the above holidays shall fall on Sunday, the Monday following shall be considered a legal holiday. Work on such days shall be paid for at the rate of double the regular straight time rate. No work shall be performed on Labor Day except in a case of extreme emergency when life or property is in imminent danger.

5. When shop employs from four (4) to ten (10) men on construction work, one shall be designated foreman by the Employers and he shall receive not less than 35c per hour in addition to the journeyman wage rate. When more than ten (10) men are employed, sufficient foremen shall be employed to maintain that ratio. Where a general foreman is

## Plaintiffs' Exhibit No. 1—(Continued)

employed he shall receive not less than 70c per hour in addition to the journeyman wage rate. All plumbing, heating and piping foremen, general foremen and superintendents when employed shall be members of the United Association. All supervisory employees shall be members of Local No. 367.

6. (a) Members sent out of town by the Employers shall be furnished first class board, room and transportation and straight time wages, eight (8) hours per day for the first five (5) days of each seven (7) days spent in travel status, from date of hire including date of return to point of hire.

7. Any workman, after being hired and reporting for work at the regular starting time and for whom no work is provided, shall receive pay for two (2) hours at the prevailing rate of wage, unless he has been notified before leaving his home not to report and any workman who reports to work and for whom work is provided shall receive not less than four (4) hours pay, and if more than four hours are worked in any one day, shall receive not less than full day's work pay. However, the exception shall be when weather or strike conditions make it impossible to put such an employee to work, or where stoppage of work is occasioned thereby or when a workman leaves his work of his own accord.

8. Pay day shall be Friday each week, with not more than one day's pay being withheld, except that if because of the size of the job and payroll more time is needed, the time shall be extended to not more than three (3) days upon request to the Union.



## Plaintiffs' Exhibit No. 1—(Continued)

Workmen are to be paid during the regular shift, whether working in a shop, Employer's yard, or in the field. When men are laid off or discharged, they must be paid wages due them immediately at the time of layoff or discharge.

9. No member shall deposit any money to guarantee the safety of any tool kit or materials, nor shall any money be deducted from his pay for same. Members required to work in any area where they are exposed to acids and caustics or other hazardous conditions shall be provided protective clothing, by the Employer, this includes welding gear.

10. Each Employer shall carry Workmen's Compensation and liability insurance, in accord with the laws of the Territory of Alaska and shall furnish proof of this to the Union. Each Employer shall comply with the Safety Code of the Territory of Alaska.

11. Where members are required to take a test for certification, such member shall be paid for his time at regular rate and shall be paid for preliminary sign-up time.

12. The Business Representative shall have access to all jobs and shops at all times during working hours.

13. Any Employer knowingly instructing a member of this Local to install work contrary to the Ordinance may be cited before the Conference Board as a violator of these Working Rules. Apprentices shall work with a journeyman at all times.

Plaintiffs' Exhibit No. 1—(Continued)

14. Any member instructed by an Employer to install work contrary to the Ordinance must warn Employer that work as laid out would be contrary to the Ordinance, then if Employer insists, the member is to proceed with work and notify the Business Representative as soon as possible.

15. No Employer shall dismiss any member or apprentice for making a complaint or giving evidence with respect to any alleged violation of any provision of these working conditions.

## XI. Sanitary and Craftsmanship Committee

(A) A committee appointed by the Executive Board to investigate all work reported as having been installed contrary to the City Ordinance or that may be installed in an unworkmanlike manner and may cause the property owner trouble at some future time. Said committee will report back to the Executive Board with a recommendation as to the disposal of each case.

## XII. Refusal to Handle

(A) Local No. 367 reserves the right to refuse to handle or install material coming from persons for firms who are considered unfair by Organized Labor and refusal to do so will not be a violation of these working rules provided that in no case will we refuse to handle or install materials Employers have on hand or in transit from port of export when notice is given.

## Plaintiffs' Exhibit No. 1—(Continued)

## XIII. Work Schedules and Wage Rates

(A) That the following work schedules and jurisdiction of work shall be determined in accordance with Sections 143-147 and as otherwise set forth in the United Association of Journeymen Plumbers and Steam Fitters Constitution and By-Laws as amended September 9, to 13, 1946.

(B) Schedule A—Plumbing

Schedule B—Heating-Piping and Air Conditioning.

Schedule C—Industrial Pipe Work.

Work performed in the construction, erection, repair, remodeling, maintenance, fabrication, dismantling and demolition of Industrial Pipe Work, within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.

Schedule D—Utilities and Pipelines.

Work performed in the construction, fabrication, installation, reconditioning, maintenance or repair of all sewer, water and gas utilities and pipeline work within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.

(C) That the following hourly wage rates shall apply to work performed by the members of the

Plaintiffs' Exhibit No. 1—(Continued)

Union on all work covered by the terms of this Agreement in the jurisdiction of Local No. 367:

General Foreman and Superintendents: 70c per hour in addition to Journeyman's rate.

Foreman: 35c per hour in addition to Journeyman's rate.

Journeyman: \$3.50 per hour.

Apprentice starting rate shall be 50% of Journeyman rate with an increase of 5% each six months period.

(D) When starting operations in a territory other than that in which the Employer's shop is located, he will report to the Local Union having jurisdiction prior to starting such work for notification and will employ workmen required in addition to his regular workmen from the Local Union having jurisdiction in that territory.

#### XIV.

In the event that any of the provisions of this Agreement shall be declared by a court of competent jurisdiction to be invalid for any cause, such invalid provisions shall be deemed to be non-existent and the remainder of this Agreement shall continue in full force and effect. The parties hereto agree that on some mutually agreeable date they will commence negotiations as to such invalidated and other affected portions of the contract.

In Witness Whereof, the parties hereto have

Plaintiffs' Exhibit No. 1—(Continued)

hereunto set their hands and seals, the day and year first above written.

For the Employer:

/s/ F. M. HASKELL PLUMBING AND  
HEATING CO., INC.

/s/ F. M. HASKELL,  
1509 Cornwall Ave., Bellingham, Wash.

For the Union:

/s/ SAM ODLE

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PLAINTIFFS' EXHIBIT No. 2

Plumbers & Steamfitters Local 367

Date: July 15, 1951

Name: Mike Cullinane. To Haskell Plb. Co., King  
Salmon. Minimum Wage: \$3.50. Craft: Fitter. Job  
Steward: Butler Fast. Dispatcher: Sam Odle.

Plumbers & Steamfitters Local 367

Date: Oct. 1, 1951

Name: Roy Callaway. To: Haskell Plbg. & Htg.  
Co. Minimum Wage: \$3.50. Craft: Plumber. Job  
Steward: Mike Cullinane. Dispatcher: Johnny  
Bennett.

Plumbers & Steamfitters Local 367

Date: Sept. 6, 1951

Name: Tom Judson. To: Haskell Plbg. Co., King Salmon. Minimum Wage: \$3.50. Craft: Stm. Fitter. Job Steward: Mike Cullinane. Dispatcher: Johnny Bennett.

Plumbers & Steamfitters Local 367

Date: Aug. 6, 1951

Name: B. F. Holbrook. To: Haskell Plbg. Co., King Salmon. Minimum Wage: \$3.50. Craft: Fitter. Job Steward: Butler Fast. Dispatcher: Sam Odle.

Plumbers & Steamfitters Local 367

Date: Sept. 6, 1951

Name: Ole Franz. To: Haskell Plbg. Co., King Salmon. Minimum Wage: \$3.50. Craft: Stm. Fitter. Job Steward: Mike Cullinane. Dispatcher: Johnny Bennett.

Plumbers & Steamfitters Local 367

Date: June 19, 1951

Name: Jim Weeks. To: Haskell Plbg. Co., King Salmon. Minimum Wage: \$3.50. Craft: Welder. Job Steward: Butler Fast. Dispatcher: Sam Odle.

Plumbers & Steamfitters Local 367

Date: Oct. 3, 1951

Name: Jesse Hobbs. To: Haskell Plbg., King Salmon. Minimum Wage: \$3.50. Craft: Steamfitter. Job Steward: Mike Cullinane. Dispatcher: Sam Odle.

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[Endorsed]: No. 14724. United States Court of Appeals for the Ninth Circuit. Haskell Plumbing and Heating Company, a corporation, Appellant, vs. Jimmy Weeks, Tommy Judson, Mike Cullinane, Ole Franz, Roy Callaway, Tom Mulcahy, Ben Holbrook, Jesse Hobbs and W. Van Smith, Appellees. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed: April 13, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.





and answered by the various Plaintiffs and filed in the case; this part of the record being introduced over the objection of the Defendant, which the Defendant contends was never admissible as evidence, and the Motion for Judgment of Dismissal at the close of the Plaintiffs' evidence and at the close of all of the evidence, as to each of the last above named Plaintiffs, should have been sustained, there being no evidence of loss of property or the value thereof or the damages suffered, if any.

3. That the only testimony given in the trial of the case from the witness stand as to loss of property and the value thereof, was that of Roy Callaway, who was the first Plaintiff called as a witness, and by the deposition in support of the claim of Jesse Hobbs. A different rule of law applied as to the error committed by the Court in overruling the Motions to Dismiss as to these two particular Plaintiffs, due to the fact that there was evidence introduced as to the loss of articles and as to the value thereof by these two Plaintiffs, and our contention as to the error committed as to these two Plaintiffs is:

(a) That the Judgment was based upon an erroneous conclusion as to the proof of value and based upon the wrong measure of damages;

(b) That no cause of action in favor of these two particular Plaintiffs, or any of the Plaintiffs, was actually proven;

4. Defendant contends that the undisputed evidence shows that Haskell Plumbing and Heating Company, Defendant, did not furnish the food or

lodging to any of the Plaintiffs; that that was furnished by the general contractor, Gaasland Company, Inc., as is shown by the depositions of F. Murray Haskell and Douglas Blair, which stand undenied by any one.

5. The Court erred in rendering judgment for the Plaintiffs, and each of them separately, as there was no evidence of any negligence on the part of the Defendant, or its agents, servants, or employees, and all negligence, if any there was, was the negligence of an employee of the general contractor, Gaasland Company, Inc. This was established only by the testimony of one of the Plaintiffs to the effect that he saw the bull cook mixing gasoline with diesel oil in the filling of the barrels which were connected with the space heaters by copper tubing, and if this was negligence, then it was the negligence of the general contractor who furnished the board and lodging for the Plaintiffs, and not the negligence of the Defendant, Haskell Plumbing and Heating Company.

6. The Plaintiffs assumed the risk by continuing on after they all knew and appreciated the danger caused by adding gasoline to the fuel used to warm the quonset hut.

7. The Court erred in admitting in evidence the contract designated as "Plaintiffs' Exhibit No. 1", since the contract showed clearly to have been a contract entered into between the Union and the general contractors doing work in Alaska, and the only place that the Haskell Plumbing & Heating Company's name appears on that document is at the bottom thereof. It is signed by "F. M. Haskell

Plumbing & Heating Company by F. M. Haskell", but neither F. M. Haskell Plumbing & Heating Company, F. M. Haskell personally, or the Haskell Plumbing & Heating Company, a corporation, are mentioned anywhere in the body of the contract, and the writing of a name not involved in this law suit, to-wit: "F. M. Haskell Plumbing & Heating Company, by F. M. Haskell" is not sufficient to make the contract binding between the Plaintiffs and this Defendant, and therefore it was incompetent, irrelevant, and immaterial, and the Court erred in overruling the objection to its being introduced and by relying on it in deciding this case.

8. The Defendant contended throughout the proceedings that the furnishing of the food and lodging done by Gaasland Company, Inc., was an act of an independent contractor for which this Defendant was not liable, which fact was well established by the depositions of F. Murray Haskell and Douglas Blair, and these facts stand admitted since they were not denied anywhere in the proceedings.

Dated at Anchorage, Alaska, this 4th day of May, 1955.

BELL & SANDERS,  
/s/ By BAILEY E. BELL,  
Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed May 6, 1955. Paul P. O'Brien,  
Clerk.



No. 14724

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**United States  
Court of Appeals**  
for the Ninth Circuit

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HASKELL PLUMBING AND HEATING COM-  
PANY, a Corporation,

Appellant,

vs.

JIMMY WEEKS, TOMMY JUDSON, MIKE  
CULLINANE, OLE FRANZ, ROY CALLA-  
WAY, TOM MULCAHY, BEN HOLBROOK,  
JESSE HOBBS and W. VAN SMITH,

Appellees.

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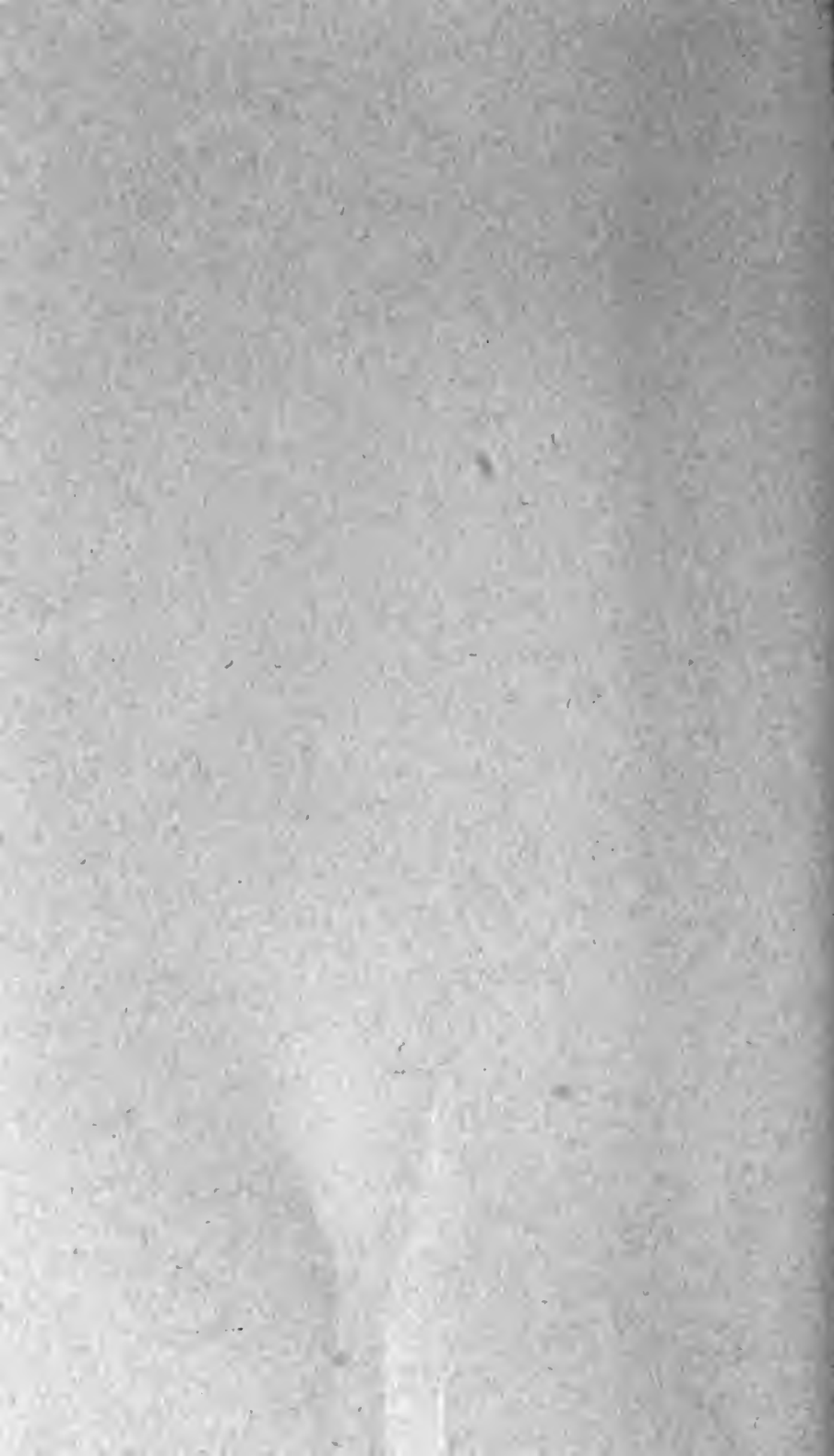
**Supplemental  
Transcript of Record**

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**Appeal from the District Court  
for the District of Alaska,  
Third Division**

**FILED**

**JAN -3 1956**



No. 14724

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**United States  
Court of Appeals**  
for the Ninth Circuit

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HASKELL PLUMBING AND HEATING COM-  
PANY, a Corporation,

Appellant,

vs.

JIMMY WEEKS, TOMMY JUDSON, MIKE  
CULLINANE, OLE FRANZ, ROY CALLA-  
WAY, TOM MULCAHY, BEN HOLBROOK,  
JESSE HOBBS and W. VAN SMITH,

Appellees.

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**Supplemental  
Transcript of Record**

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**Appeal from the District Court  
for the District of Alaska,  
Third Division**





In the District Court for the District of Alaska,  
Third Division

No. A-7736

JIMMY WEEKS, TOMMY JUDSON, MIKE  
CULLINANE, OLE FRANZ, ROY CALLA-  
WAY, TOM MULCAHY, BEN HOLD-  
BROOK, JESSE HOBBS and W. VAN  
SMITH,

Plaintiffs,

vs.

HASKELL PLUMBING AND HEATING COM-  
PANY, INC., a Corporation Authorized Under  
the Laws of the State of Washington and Doing  
Business in the Territory of Alaska,

Defendant.

DEPOSITION OF F. MURRAY HASKELL

December 29, 1954

\* \* \*

Cross-Examination

By Mr. Gemmill:

Q. This place that is referred to as King Salmon,  
is that out in the vicinity of Naknek?

A. You should distinguish between the two. First  
of all, Naknek proper is eight miles down the river  
and the place where our job was was actually called  
King Salmon, but because of geographical locations  
they named the other, the air base, as Naknek Air  
Base or King Salmon Air Base, whichever one you

prefer, but [8\*] it is easier to spot on the map, to find Naknek than it would be to find King Salmon.

Q. Well, these men were working at King Salmon? A. That is correct.

Q. Or near King Salmon?

A. That is correct.

Q. And that is about how far from Naknek?

A. About approximately eight miles down the river.

Q. What type of construction was taking place up there in October of 1951?

A. We were building this base.

Q. An air base?

A. No, it is a secret base.

Q. And the work was being performed for the United States Government?

A. That is correct.

Q. Who was the prime or general contractor up there?

A. Gaasland Construction Company.

Q. Gaasland. Did Gaasland Construction Company have the contract with the Government to construct this base? A. That is correct.

Q. Which you say is of a secret nature?

A. That is correct.

Q. Now, where did Haskell Plumbing and Heating Company come into the picture? Did Haskell Heating & Plumbing Company have a subcontract with the Gaasland Construction Company?

A. That is correct.

Q. And about when was that contract entered into—just approximately? [9]

A. I believe it was right in the neighborhood of May of that year.

Q. Of 1951?

A. Yes. Is that approximately right? I believe that is about right.

Q. And what was the nature of the work that the Haskell Construction Company agreed to perform for Gaasland Construction Company?

A. We agreed to install all the plumbing, utilities, heating, sheet metal work, and roofing.

Q. On the various and in the various buildings that would be constructed there at that base?

A. That is correct.

Q. Were you personally there at King Salmon or Naknek while this construction work was going on?

A. From time to time, yes.

Q. Were you there in October of 1951?

A. What is the date of the fire?

Mr. Ehrlichman: The 11th.

Q. (By Mr. Gemmill): October 11th.

A. I was there approximately two weeks after the fire.

Q. Were you personally acquainted with any of the plaintiffs in this action: Jimmy Weeks, Tommy Judson——

A. Yes, I know several of them.

Q. (Continuing): ——Mike Cullinane, Ole Franz, Roy Callaway, Tom Mulcahy, Ben Holbrook, Jesse Hobbs and W. Van Smith? You knew all those men?

A. Yes.

Q. Were they employees of the Haskell Plumbing & Heating [10] Company?

A. That is correct.

Q. And you as secretary of the corporation exercised some managerial authority?

A. That's right.

Q. Directed these men in their working?

A. I hired a superintendent who I directed, and as the superintendent directed the personnel underneath him.

Q. Where were these men employed, I mean, where were they contacted or where did they make application for employment with the Haskell Plumbing and Heating Company?

A. The request was sent into the local union for their hire.

Q. Through Seattle?

A. No, through Anchorage.

Q. Through Anchorage? A. Yes.

Q. That is, your contact then, the contact of the Haskell Plumbing and Heating Company was through the union at Anchorage?

A. We must hire all our personnel through the union, and the location of where these men are to be obtained is where there is a local union that takes control of that area.

Q. Were all of these plaintiffs whose names I read to you engaged in plumbing and heating work?

A. Yes.

Q. That is, their employment was essentially of the same kind? [11]

A. That is correct.

Q. Now, at the time that these plaintiffs were hired by Haskell Plumbing and Heating Company

where did they first report for work or in connection with their employment?

A. They reported right to King Salmon. Well, actually, we picked them up at the plane when they arrived on the airplane.

Q. Arrived where?

A. At the airplane, at King Salmon.

Q. Was there an air base there at King Salmon?

A. Yes.

Q. Did these men sign any kind of a contract, a written contract, regarding their employment up there at King Salmon?

A. No, nothing beyond the normal——

Q. What?

A. Nothing beyond the normal union agreement.

Q. Well, did you have, did Haskell Plumbing & Heating Company, have a written agreement with the plumbers' union? A. Yes, we did.

Q. Do you have that with you?

A. No, I don't.

Q. Are you familiar with the terms of it?

A. Yes, I am.

Q. And was that the only written agreement that existed between any of these plaintiffs and Haskell Plumbing & Heating Company?

A. That is correct. [12]

Q. It was through the representative of the union? A. That is correct.

Q. Did the contract with the union state what wages would be paid these workmen?

A. Yes.

Q. You remember what that was; an hourly rate?      A. An hourly rate, yes.

Q. Something like three dollars and fifty cents an hour?      A. Correct.

Q. And did the contract further state what would be furnished these various employees, and I am referring now to the plaintiffs here, in addition to the wages that would be paid them?

A. That is correct.

Q. Did the contract provide that these men would be furnished with housing or living facilities?

A. That is correct.

Q. And that they would be furnished room, or board, their meals?      A. That's right.

Q. And this contract also—well, the contract provided that Haskell Plumbing & Heating Company would furnish these facilities to these various workmen, didn't it?

A. That is correct.

Q. Now when these men arrived on the job up there at King Salmon you say they first stayed at the Sky Motel?      A. That is correct.

Q. At Naknek?

A. At King Salmon, actually.

Q. At King Salmon? [13]      A. Yes.

Q. And who directed them to go to the Sky Motel?      A. We did.

Q. The Haskell Plumbing & Heating Company?

A. Yes.

Q. Then I think you stated they stayed there for about two months?

A. That is correct.

Q. And then other facilities became available for them?      A. That is correct.

Q. And the other facilities consisted of the barracks or Quonset hut which burned down on October 11, 1951?      A. That's right.

Q. Who directed the men, meaning the plaintiffs in this action, to go from the Sky Motel over to the Quonset hut or barracks at King Salmon which burned down on the 11th of October, 1951?

A. I would say we did.

Q. And by "we" you mean, I assume——

A. Our company.

Q. (Continuing):      ——Haskell Plumbing & Heating Company.

A. The reason being that the limit of facilities at the Sky Motel were exhausted and there were too many men to stay at that location.

Q. You had too many men?

A. Well, not only ourselves, but all the contractors combined. There was too many men for the facilities.

Q. Who requested this Quonset hut or barracks which the plaintiffs occupied there at King Salmon after leaving the Sky Motel; who directed or requested the construction [14] or preparation of those facilities for these men who worked for you?

A. I wish you would repeat your question again.

The Reporter: (Reading):

"Q. Who requested this Quonset hut or barracks which the plaintiffs occupied there at King Salmon after leaving the Sky Motel; who directed or re-

quested the construction or preparation of those facilities for these men who worked for you?"

A. Gassland Construction Company.

Q. Did Haskell Plumbing & Heating Company make any request or have any agreement with the Gaasland Construction Company for the construction or preparation of those facilities for your men?

A. We were asked to submit the number of men that we would have to Gaasland so they could prepare to house the total number that would be required for all the different subcontractors on the job.

Q. Then is it your testimony that the Gaasland Construction Company was the owner of this Quonset hut or barracks which burned on October 11th, 1951?      A. That is correct.

Q. And the Haskell Plumbing & Heating Company had an agreement with the Gaasland Construction Company——

Mr. Ehrlichman: Well, now, I will object to that. What agreement do you mean?

Mr. Gemmill: Wait until I finish.

Q. (Continuing): ——whereby the Gaasland Construction [15] Company furnished these facilities for your men?      A. Yes; at a going rate.

Q. And did you have a written agreement or contract with Gaasland Construction Company?

A. In regard to housing and that?

Q. In regard to housing your employees up there.

A. No, sir, no more than I would have with



Universal Foods in Fairbanks or Anchorage where the same type of housing is available.

Q. Then what did Haskell Plumbing & Heating Company pay to the Gaasland Construction Company for the facilities that they furnished?

Mr. Ehrlichman: If you can recall.

A. I don't know the exact sum. It was added up as a total sales for all the man-days, a lump sum charged against us for the use of their facilities.

Q. And you are sure that there was no written agreement between Haskell Construction Company, or Haskell Plumbing & Heating Company, and the Gaasland Construction Company regarding that subject matter?

A. No, not to my knowledge.

Q. As far as you remember then it was just an oral agreement on the part of Haskell Plumbing & Heating they would pay so much per man-day for their employees?

A. It would be charged against our account.

Q. Was there any memorandum that you have ever seen or known about that set forth the terms or the amounts, the rate, that the Haskell Construction Company would pay?

A. No, sir. [16]

Q. There probably was something of that nature, wasn't there?

A. There was, but I don't recall it.

Q. Would the corporate records of Haskell Plumbing & Heating Company have such a memorandum if it existed?

A. If the records were brought down from the North, they would, I would say.

Q. And where are the corporate records?

A. At our establishment on 1509 Cornwall.

Q. Fifteen what?

A. 1509 Cornwall, Bellingham, Washington.

Q. I didn't get the name of that street.

A. 1509 Cornwall Avenue.

Q. Cornwall?

A. Yes. But to my knowledge, I don't believe—at least, I have never seen anything beyond an oral agreement.

Q. Now in your direct testimony you referred to Gaasland Construction Company as an independent contractor in furnishing these facilities for your men. Is your testimony definite now that as far as you know you had no written contract with the Gaasland Construction Company whatsoever upon that subject matter?

A. Upon feeding and housing?

Q. Yes. A. That's right.

Q. Would you explain then how you concluded, upon what facts did you base your conclusion that the Gaasland Construction Company was an independent contractor?

Mr. Ehrlichman: Now, just a minute. I am going to object to that question. The term [17] independent contractor is a legal term of art, and I think that probably the term was used in a question of mine rather than in testimony of Mr. Haskell.

Mr. Gemmill: That's right.

Mr. Ehrlichman: And I don't believe that Mr. Haskell should be called upon to set forth the elements of an independent contractor relationship as they are contemplated in the law. If counsel would like to put those elements to him step by step, and ask him whether or not they existed, I think it would be a proper question, but I will object to its form when it calls for the evidentiary elements of what amounts to a legal conclusion, which I probably put inadvertently.

Mr. Gemmill: All right, I would like to state that the reason for going into that subject matter here in the manner in which I am doing so is because counsel for defendant submitted a question in which he used the term independent contractor when referring to Gaasland Construction Company in connection with the furnishing of housing facilities for the employees of the Haskell Construction Company. The witness stated that the Gaasland Construction Company was an independent contractor. Now I am asking the witness upon what facts he bases his conclusion that Gaasland Construction Company was an independent contractor in the furnishing of housing [18] facilities for the plaintiffs in this action.

Mr. Ehrlichman: Well, Counsel, in order to circumvent this impasse, I will suggest that on redirect I will go into each element which made up the independent contractor relationship, and then on recross you can go into that more fully. How will that be?

Mr. Gemmill: No, under our stipulation he has to answer, doesn't he?

Mr. Ehrlichman: Yes; if he knows.

A. I am not quite certain what you are asking.

Mr. Ehrlichman: That's what I thought.

Q. (By Mr. Gemmill): Let me start it this way. Do you know what legally constitutes an independent contractor? A. No, sir.

Q. What? A. No, sir.

Q. Then when you answered affirmatively to a question which your counsel submitted to you using the term independent contractor, you did not understand the legal significance of the term independent contractor, did you? A. No, sir.

Q. Do you know what elements distinguish an independent contractor, the relationship of an independent contractor from those of an employee or other relationships, legal relationships of a similar nature?

Mr. Ehrlichman: Well, I have a running objection to all these questions of law in here. [19]

I think it is unnecessarily prolonging the deposition. The witness doesn't set himself up as a lawyer.

A. Well, might I ask what an independent contractor is?

Q. Well, now, I am just trying to find out what you understood or what was in your mind when you make an affirmation to a question counsel put to you, when you affirmed that the Gaasland Construction Company was an independent contractor. I will ask you this. Now, along with that, and in ex-

planation of the testimony that you gave on direct examination, from a legal standpoint you don't know now whether Gaasland Construction Company actually was an independent contractor in the furnishing of the facilities, of the housing facilities, for your men at King Salmon?

Mr. Ehrlichman: I will object to that as calling for the legal conclusion of the witness. You can go ahead and answer, if you can, Mr. Haskell.

A. Would you repeat the question?

The Reporter: (Reading):

“Q. I will ask you this. Now, along with that, and in explanation of the testimony that you gave on direct examination, from a legal standpoint you don't know now whether Gaasland Construction Company actually was an independent contractor in the furnishing of the facilities, of the housing facilities, for your men at [20] King Salmon?”

A. Well, in answer to that, my testimony was that Gaasland Construction Company did furnish the housing and feeding for our men.

Q. But what the legal relationship was between Gaasland Construction Company and Haskell Plumbing & Heating Company you wouldn't venture to state, would you? A. No.

Q. In other words, you don't know what the legal elements are that go to make up the relationship of an independent contractor?

A. No.

Q. Under the terms of your contract with the representative union at Anchorage in connection with the hiring of the plaintiffs in this case, at King

Salmon, you were aware and conscious of the obligation of the Haskell Plumbing & Heating Company to furnish these men, your employees, with housing facilities and with their meals during the time they were performing their contract with your company?      A. That is correct.

Q. And you folks, meaning the Haskell Plumbing & Heating Company, undertook to do that?

A. That's right.

Q. And in doing that you did the things that you have already testified here that were done by the Haskell Plumbing & Heating Company to furnish the men with those facilities?

A. That's right.

Q. Did Haskell Plumbing & Heating Company ever through any [21] of its employees make any inspection of these barracks or of the meals, food and so on, that was being furnished to your employees?

A. I have been in the buildings, all the buildings, yes.

Q. Did you check on those things from time to time?

A. No, not from time to time. I was there—pardon me—either myself or my agent would, which was my superintendent, would receive any complaints that someone might bring forth, which we would in turn transfer to Gaasland Company's superintendent who would see that they were done.

Q. Did you personally receive any complaints from any of the men?      A. No, sir.

Q. But your agent did receive some?

A. I don't know. I have no knowledge.

Q. But you say if any complaints would or should come in, then the Haskell Plumbing & Heating Company would endeavor to make what correction was necessary by contacting the Gaasland Construction Company?

Mr. Ehrlichman: Just a minute. I will object to that as being a question calling for speculation as to what might have been done in a situation which obviously from the testimony never happened, and, therefore, is immaterial.

Mr. Gemmill: I am simply following up what you stated there about complaints, if any complaint did come in.

Mr. Ehrlichman: But the witness said that there were never any complaints to his knowledge, [22] so your question calls for speculation on his part as to what he would have done if there had been any complaints. I don't think that is helpful on this inquiry, but you may answer, realizing that it does call for your speculation, Mr. Haskell.

A. The men could go, which they have done directly, go right direct to Gaasland personnel and ask them to correct any measure that might need to be corrected, and there is certain rules and regulations of the Territory that we must abide by, and, therefore, we—well, I think I stated. Just skip that last.

Q. By rules and regulations, you mean the Territorial laws?      A. That's right.

Q. With reference to health and sanitation?

A. That is correct.

Q. And so on? A. Yes.

Q. Living standards? A. That's right.

Q. Did Haskell Plumbing & Heating Company give any general instructions or directions regarding what these men should be fed in the way of food? A. No.

Q. What food should be purchased?

A. No, sir.

Q. This particular Quonset hut or barracks where these plaintiffs lived, how was it heated?

Mr. Ehrlichman: If you know. [23]

A. By a space heater, I believe.

Q. Where was it situated in the building? By that I mean, was there a basement or was it sitting on the floor?

A. We had no basements up there.

Q. No.

A. It would be on the main floor.

Q. It was sitting on the floor of the Quonset hut? A. To my knowledge, yes.

Q. Was there more than one heater in this particular hut that burned?

A. That I don't know.

Q. It used oil for fuel?

A. That's right.

Q. Did you or any of your men have anything to do about the inspection of that heater?

A. Gaasland Construction had a bull cook—bull cooks.

Q. Had what?

A. Bull cooks, and what you call the camp man-



ager, and they made periodic inspections and cleaned up, made beds, in the quarters.

Q. When you were up there at King Salmon, where did you stay, where did you live?

A. I lived in the quarters right next to the mess hall.

Q. How often, if you can remember, would you, while living up there, be in this particular hut that burned?

A. I believe during the whole duration I was at the building two times.

Q. Just twice all the time that you were there?

A. That's right.

Q. Did you ever go in there to talk to any of your men—the [24] plaintiffs?

A. In a social manner, yes.

Q. Was your superintendent the man who is directly over the plaintiffs in this action?

A. That's right.

Q. And he would see the men there in the barracks probably every day?

A. He lived in the quarters right next to the mess hall also. How many times he was at the barracks that burnt, I have no knowledge.

Q. Now in the relationship between your superintendent and the plaintiffs in this action, when they would have any necessity of getting together to receive instructions, consultation and so on, did they have any meeting place other than the barracks there where they lived?

A. There was one other quarters made available

for social. Any meeting pertaining to the job would be held on the job site itself.

Q. And was that also maintained by the Gaasland Construction Company?

Mr. Ehrlichman: What are you referring to, Counsel?

Mr. Gemmill: These other quarters.

Mr. Ehrlichman: The social hut, you mean?

Mr. Gemmill: Yes.

A. Yes.

Q. Would it be possible for you to examine the records in your office to determine whether you have a memorandum or a copy of a memorandum pertaining to the compensation [25] which Haskell Plumbing & Heating Company was to pay to Gaasland Construction Company for the maintenance of their men there at King Salmon?

Mr. Ehrlichman: Just a minute. I am going to state for the record that had counsel wished to see those records or any agreement, or anything pertaining to this case, he could very easily have requested them in advance and we would have been happy to oblige by searching for them. Obviously now we are in the middle of the holidays and it would be a considerable inconvenience at this late date to attempt to produce an instrument of this sort from ancient records, and I think I must insist that counsel obtain proper process if he wants us to produce any business records so close to trial, and I am going to advise Mr. Haskell to consider this statement of mine as a sufficient response to that question.

Mr. Gemmill: In other words, you are instructing him not to answer.

Mr. Ehrlichman: I don't see as his answer would be material in view of my comment upon that question. In other words, I think that any production of those records should be by proper process timely made.

Mr. Gemmill: He is virtually instructed not to answer then, isn't he? I just wanted to get the record straight.

Mr. Ehrlichman: No, I did not instruct him not to answer. My statement is that I think my [26] statement is a sufficient answer to your question, and that is that those records were available at all times during the pendency of this action and have never been sought by process or even by informal request until this moment, and I am afraid that it is an untimely request at this time under the circumstances. Now, certainly Mr. Haskell can answer your question in any way he sees fit.

Mr. Gemmill: Okeh; just so we get an answer in here.

A. We have records, but it would certainly be a painstaking long job to dig down there and pull out the record.

Mr. Ehrlichman: And I may say that on the basis of this witness' previous testimony, it appears that there is some question as to the existence of such a document.

Mr. Gemmill: Well, I am asking merely this, if he would be willing to look.

Mr. Ehrlichman: And I am advising him that

whether he is willing to look or not is immaterial and I don't believe it is necessary for him to answer that question under the circumstances.

Q. (By Mr. Gemmill): Haskell Construction Company paid the plaintiffs their wages periodically, didn't they? A. Weekly, yes.

Q. Weekly; in accordance with your union contract? A. That is correct. [27]

Q. And none of the plaintiffs were required to pay either the Haskell Plumbing & Heating Company or to Gaasland Construction Company anything for their room and board?

A. That's right.

Q. You as secretary of Haskell Plumbing & Heating Company were at all times satisfied, I gather from what you have said, that the Gaasland Construction Company was furnishing a proper and suitable place for your men while they were working there?

Mr. Ehrlichman: I will object to that as immaterial. I still—well, let it stand at that.

A. The setup that they had was very similar, if not superior, to other camps we had.

Q. In other words, it met your requirements?

A. It wouldn't be my requirements; it would be the men's requirements.

Q. It met the requirements of the Haskell Plumbing & Heating Company?

Mr. Ehrlichman: I think that question has been answered.

A. Again I repeat, the men's requirements. I have no say-so what the men want.

Q. Well, to illustrate what I am getting at, if you at any time had considered that the facilities furnished by Gaasland were inadequate, wouldn't it have been the duty of Haskell Plumbing & Heating Company to do something about it?

Mr. Ehrlichman: I object to that as calling for the conclusion of the witness, and also a question that calls for speculation and conjecture [28] on the part of the witness, and is a question that is immaterial in this inquiry. Go ahead and answer.

Q. (By Mr. Gemmill): His objection is for the record. You may answer.

A. If the men found that the quarters were not satisfactory, then we would be forced to locate other quarters and purchase same from someone else.

Q. In other words——

A. (Interposing): Be similar to a hotel. If they didn't like a hotel they are living in, and we had told them that would be a nice place to stay, why then they can look for another quarters. They also have the privilege of accepting money in lieu of quarters.

Q. But none of the plaintiffs in this case did that? A. Because there was nothing available.

Q. Your contract with the union, that is, the contract between the Haskell Plumbing & Heating Company and the union at Anchorage, provided that you would furnish them with suitable and adequate living facilities? A. That's right.

Mr. Ehrlichman: Now, I am going to object to that question as assuming that union represented these men.

Q. (By Mr. Gemmill): Well, the union you mentioned that you had your contract with is the union I mean?           A. Yes.

Mr. Gemmill: That is all.

\* \* \*

[Endorsed]: Filed January 3, 1955. [29]

**No. 14,724**

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

HASKELL PLUMBING AND HEATING COMPANY,  
INC., a corporation authorized under the  
laws of the State of Washington and do-  
ing business in the Territory of Alaska,  
*Appellant,*

VS.

JIMMY WEEKS, TOMMY JUDSON, MIKE CUL-  
LINANE, OLE FRANZ, ROY CALLAWAY, TOM  
MULCAHY, BEN HOLBROOK and JESSE  
HOBBS,  
*Appellees.*

On Appeal from the District Court for the  
Territory of Alaska, Third Division.

**BRIEF OF APPELLANT.**

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BELL, SANDERS & TALLMAN,  
Central Building, Anchorage, Alaska,  
*Attorneys for Appellant.*

**FILED**

**NOV 15 1955**

**PAUL P. O'BRIEN, CLERK**





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2. There was not a word of evidence produced at the trial as to the amount and kind of property lost or the value thereof or the damages suffered by the following named persons: Jimmy Weeks, Mike Cullinane, Ole Franz, Tommy Judson, Tom Mulcahy, and Ben Holbrook, and the judgment as rendered was based solely upon the answers to the discovery interrogatories served by the defendant and answered by the various plaintiffs and filed in the case; this part of the record being introduced over the objection of the defendant, which the defendant contends was never admissible as evidence, and the motion for judgment of dismissal at the close of the plaintiffs' evidence and at the close of all of the evidence, as to each of the last above named plaintiffs, should have been sustained, there being no evidence of loss of property or the value thereof or the damages suffered, if any.....	15
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No. 14,724

IN THE

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HASKELL PLUMBING AND HEATING COMPANY,  
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MULCAHY, BEN HOLBROOK and JESSE  
HOBBS,

*Appellees.*

On Appeal from the District Court for the  
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**BRIEF OF APPELLANT.**

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**JURISDICTION.**

The jurisdiction of the District Court was invoked and authorized under the Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended 48 U.S.C.A., Section 101 and Section 53-1-1, 1949 Alaska Compiled Laws Annotated. The Circuit Court of Appeals has jurisdiction in this matter by virtue of the provisions

of Section 1291, Chapter 92, of the Judiciary and Judicial Procedure Act, 28 U.S.C.A., June 25, 1948, c. 646, 62 Stat. 912; also, Section 8C of the Act of February 13, 1925, as amended. (28 U.S.C.A. 1294.) Practice in the District Court for the District of Alaska and appeals from the judgments rendered in said Court are all governed by the Federal Rules of Civil Procedure by virtue of 63 Stat. 445, 48 U.S.C.A. 103A.

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### STATEMENT OF FACTS.

This action was commenced by filing a complaint in the District Court for the Territory of Alaska, Third Division, at Anchorage. This complaint was joined into by Jimmy Weeks, Tommy Judson, Mike Cullinane, Ole Franz, Roy Callaway, Tom Mulcahy, Ben Holbrook, Jesse Hobbs, and W. Van Smith, plaintiffs. Haskell Plumbing and Heating Company, Inc., was the only defendant. The complaint consists of nine (9) separate causes of action for loss of personal property growing out of a fire that destroyed a metal quonset hut at King Salmon, Alaska. (Tr. 3-15.)

To this complaint, defendant filed a motion to dismiss and to strike. (Tr. 16-17.) In this motion the defendant contended that the Court should dismiss all of the purported causes of action, save and except possibly the first named plaintiff, Jimmy Weeks. The motion was also to strike all causes of action other than Cause of Action No. One, and contended that there was a misjoinder of causes of action and a misjoinder of plaintiffs in the complaint; that there was

no privy of contract in any way between the plaintiffs. They were not associated together, were not partners and were not joint claimants and had no legal connection whatsoever and were attempting to file a multiple suit against the defendant which was not authorized by law or by Rules 19 and 20 of the Federal Rules of Civil Procedure, claiming that this kind of action was not anticipated or covered by said rules and that the defendant could not have a fair and impartial trial in an action such as the one set forth in the complaint. That each of the claims set forth therein was in the nature of a jury case, but tried in such volume would confuse the jury beyond correction by the Court's instructions, and that the causes of action should therefore be dismissed, and in lieu of dismissal, should be stricken from the complaint, except the original plaintiff, Jimmy Weeks. And for the further reason that none of the causes of action even attempted to plead any set of facts whatsoever authorizing any one of the plaintiffs, or all, to recover any sums whatsoever. That the complaint was wholly inadequate and did not state facts sufficient to constitute a cause of action in any way in favor of the plaintiffs and against the defendant. This motion was heard and overruled and by our rules an exception allowed. The defendant was given twenty (20) days to answer.

An answer was filed by the defendant on May 7, 1953, which answered all of the nine (9) separate causes of action. (Tr. 18-22.)

After the answer was filed, interrogatories were propounded by the defendant, properly served on the

plaintiffs' counsel, who, in time thereafter, filed answers to the interrogatories.

At the commencement of the trial and before any evidence was introduced, the defendant moved to dismiss the plaintiffs' complaint and then it moved separately to dismiss each of the nine (9) causes of action. Then it moved separately to strike or dismiss, optional, all but the first cause of action on two grounds: (1) that there was a misjoinder of parties plaintiff and also a misjoinder of causes of action; and (2) that the allegations in the complaint were not sufficient to state a cause of action in favor of each individual plaintiff and against the defendant.

These motions were overruled by the court. When the first witness was called, the defendant objected to the introduction of any evidence on behalf of the plaintiffs for all of the grounds stated in the motions to dismiss. This objection was overruled and exception allowed.

At the close of the plaintiffs' testimony, defendant renewed its motions to dismiss and its objections to the introduction of any evidence and moved the Court to strike all of the testimony based upon the theory argued in the former motions; that is, improper joinder of parties plaintiff and that the complaint did not state a cause of action in favor of any of the plaintiffs against this corporate defendant. This motion was made separately as to each plaintiff. The defendant moved to strike the interrogatories and all of the contents thereof, that had been introduced in



evidence over the objections of the defendant, for the reason that they were improperly introduced and were not competent evidence; that the defendant was not permitted to cross-examine the witnesses. Therefore, the interrogatories had no place in the evidence in the case and were not admissible for any reason except for the impeachment of the witness making the statement, and would then be admissible only if offered by the adverse party.

A separate motion to dismiss was directed against the evidence for its failure to show any negligence on the part of the defendant or any breach of duty, it being argued to the Court that not a scintilla of evidence was introduced of any negligence on the part of anyone, except the bull cook, who one of the witnesses testified, mixed some gasoline in the stove oil out in the yard somewhere. The evidence showed that the bull cook was not an employee or connected with Haskell Plumbing and Heating Company, Inc., in any way. It was further shown and undisputed that the board and quarters were furnished by Gaasland, Inc., by the depositions of F. Murray Haskell (Tr. 394) and Douglas Blair (Tr. 389).

The motions to dismiss were summarily overruled by the Court because practically the same motion had been made and overruled at the beginning of the case.

The Court allowed argument on the motion to dismiss the actions in which the only evidence of the suffering of any loss or damage was the interrogatories filed by the plaintiffs. (Tr. 378.) The Court over-

ruled the motion to strike the evidence based solely upon the interrogatories and heard argument on the motion to dismiss for want of evidence. (Tr. 380.)

It was never argued or insisted by the plaintiffs that this bull cook was an employee of the Haskell Plumbing and Heating Company, Inc. Plaintiffs contended it made no difference. (Tr. 381.)

After argument the motion was denied and the Court asked for additional testimony on one matter. Floyd A. Lundquist, an insurance adjuster, was called and testified. (Tr. 414.) He merely testified to customs of settling cases of this kind. We contend that no part of this evidence was competent.

A certain contract entered into between the Plumbing-Heating and Piping Employers of Anchorage, Alaska, and Local No. 367 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe-Fitting Industry of the United States and Canada was introduced in evidence as plaintiffs' Exhibit No. 1. (Tr. 426.) This was done over the repeated objections of the defendant for the reason that the defendant was not a party to the contract, it being a contract between separate and different parties other than the defendant here.

To the judgment as rendered, a motion for a new trial was filed, which is as follows:

*“Motion for a New Trial*

Comes now the Defendant above named and moves the Honorable Court to grant a new trial in the above entitled cause and for grounds of said motion states:

1. That the Court erred in overruling the Defendant's Motion to Dismiss the Plaintiffs' complaint for the reason that it constituted an improper joinder of parties plaintiff and an improper joinder of causes of action.

2. That the Court erred in overruling the Motion to Dismiss the Plaintiffs' complaint for the reason that the complaint did not state a cause of action in favor of any of the plaintiffs and against the defendant.

3. That the Court erred in refusing to sustain the defendant's separate motions against each and every one of the plaintiffs separately, for the reasons set forth above, all of which motions were made at the commencement of the trial of the case.

4. The Court erred in overruling the defendant's objections to the introduction of any evidence on behalf of the plaintiff, for all of the reasons set forth in the previous motions.

5. The Court erred in allowing over the objections of the defendant to be introduced in evidence, the interrogatories filed out and answered by the various plaintiffs.

6. The Court erred in overruling the plaintiff's Motion to Dismiss the entire case at the close of the plaintiffs' evidence.

7. That the Court erred in overruling the Defendant's Motion to strike all testimony as to each and every plaintiff individually which motion was made at the close of the Plaintiff's testimony.

8. The Court erred in allowing to be introduced in evidence the contract marked Plaintiff's

Exhibit Number 1 for the reason the same was incompetent, irrelevant, immaterial and not properly identified and not within the pleadings and issues involved.

9. The Court erred in denying the Plaintiff's motion to strike Exhibit Number 1 at the close of the Plaintiff's case.

10. The Court erred in denying the defendant's Motions made against each individual plaintiff to dismiss each individual complainant for the further reason that there was no proper proof of the measure of damages offered and no competent evidence introduced as to the value of the property lost.

11. The Court erred at the close of the evidence in denying the defendant's Motion to strike all testimony of the plaintiff.

12. The Court erred at the close of the evidence in overruling the defendant's motion to strike the interrogatories introduced over the objections of the defendant.

13. The Court erred at the close of the case in refusing to sustain the defendant's Motion to Dismiss the separate plaintiff's complaints for the reason that the evidence did not justify a Judgment in favor of any one separately or collectively of the plaintiffs.

14. The Court erred in refusing to strike all evidence of property lost as to each separate individual because there was no competent evidence as to the value of the property lost.

15. The Court erred in denying the defendant's Motion to dismiss made at the close of all

of the evidence against each plaintiff separately on the theory that there was no negligence proven as against the defendant.

16. The Court erred in rendering Judgment in favor of the Plaintiffs and each of them wherein he held that the bull-cook or the employees of the Gaaslin Company were the agents of the Defendant Haskell Plumbing Company by reason of the written contract introduced as plaintiff's Exhibit Number 1 and held further that the responsibility to furnish food and lodging could not be delegated to Gaaslin Company and further holding that even though the evidence was, that Haskell Company and its employees did not put this gas in the oil; it being the duty of the Haskell Company to see that these premises were safe; and by finding the defendant liable for this damage.

17. The Court further erred in rendering judgment in favor of the various plaintiffs for the amount sued for after a deduction of 30% of the amount claimed as in many instances there was no competent evidence offered and none received on behalf of the various separate plaintiffs and there being no competent evidence as to the extent of loss and there could be no legal reason to support a judgment in favor of each of the plaintiffs for any sum whatsoever.

The defendant moves this Honorable Court to set aside the judgment rendered and grant a new trial for all of the reasons above stated.

Dated at Anchorage, Alaska, this 12th day of January, 1955.

Bell & Sanders  
/s/ By Bailey E. Bell,  
Attorney for Defendant''

This Motion for a New Trial was overruled and the Notice of Appeal was filed (Tr. 128) and the case was brought to this Court for reversal.

Statement of Points Relied upon was filed. (Tr. 446.)

### **Trial.**

On Wednesday, January 5th, 1955, this matter came on for trial before the Honorable Walter H. Hodge, District Judge. Plaintiff was present with Harold J. Butcher, attorney. Bailey E. Bell of Bell & Sanders represented the defendant.

After opening statements, William Cruthers was called as the first witness for the plaintiff. A transcript of his testimony, or the portion thereof involved in this appeal, is set forth in the Transcript of Record at pages 130-132.

Then Sam Odle was called. (Tr. 132-149.)

Then Roy Callaway was called as a witness. (Tr. 150-212.) The testimony in the Callaway cause of action was full and complete and the defendant was given a right to cross-examine Callaway as to the value of the articles, where he procured them, etc. But, thereafter no other witness called was asked to go into detail as to the value of his property.

The plaintiffs moved the Court to use the interrogatories and answers as proof and the only proof offered for each of the plaintiffs thereafter (save and except a deposition of Jesse Hobbs (Tr. 321) was merely testimony to describe the place they were work-

ing and living and an effort made to prove liability of the defendant. On each occasion the interrogatories were introduced in lieu of testimony as to damages suffered or loss resulting from the fire.

On page 222 of the transcript you find the following statements:

“Q. Now you lost certain personal property in this fire?

A. Yes, I did. (121)

Q. And that personal property, you have set forth in full, to the best of your ability, in answers to interrogatories that were submitted to you—answering in—I wonder if your Honor having the file could give me the date?

The Court. Oh, yes. Mr. Judson—

Mr. Butcher. Mr. Judson.

The Court. Mr. Judson. Yes. (The Court looks for the information.) The answer to interrogatories signed by Thomas B. Judson on February 8, 1957 (laughter). Yes, that is right—1957. Probably it is 1954 because it was filed on April 2, 1954, and with that correction—

Mr. Butcher. The interrogatories were submitted in 1953, Your Honor.

The Court. I see what's happened here. The notary taking the acknowledgment has used the same year date as when his commission expires, which no doubt explains the error. We will change this to '54, by leave of counsel. February '54.

Q. (by attorney for plaintiffs). Is that your recollection when you answered these interrogatories?

A. I believe so.

Q. And at that time, you set forth to the best of your ability, the items you lost and the price thereof. Is that correct?

A. That's right. (122)

Mr. Bell. Now, Your Honor, I want to cross-examine him about what he proved—or attempting to prove—and did not rely upon the interrogatories, but has attempted to prove by this witness that all of those prices in there are correct. Now I have a right to cross-examine him, Your Honor.

Mr. Butcher (laughter). If I were introducing a deposition, I'd still have to tie the deposition in with the facts and all that stuff.

The Court. I thought we could avoid all of this, but you did ask him whether the statements made in his answers to the interrogatories were correct answers to the best of his ability.

Mr. Butcher. Well, I withdraw that question, then, Your Honor, and ask that it be stricken.

The Court. I fear that it is too late. I would say that that opens the matter up for cross-examination.

Mr. Butcher. I withdraw it then and ask your Honor to disregard it and to strike it from the record.

Mr. Bell. I think he's laid it open now.

The Court. I doubt if we can do that now.

Mr. Butcher. Well, then, Your Honor, if Your Honor can't entertain that, I insist if I have not tied this witness into that deposition, as the Tommy Judson who took that deposition, and that those were his answers, then he could have found fault with that, and I did it simply to avoid (123) argument. Now, certainly we have no jury



here, and if I withdraw that, Your Honor is going to have the depositions before him, or the interrogatories and I withdraw any reference that this witness made to those interrogatories; except, perhaps, I am sure I've got to ask him if he —— I want you to understand that I am not asking him one word about the property that he has lost, and I've certainly got to tie them in with the deposition someway, and I think that I should at least ask him if he is the Tommy Judson who answered certain interrogatories propounded to him and then stop there. Now, if I withdraw all but that——

The Court. Well, upon further reflection, I believe that it is the right of a party to withdraw the question and the answer to that question. It is rather unique in my experience, but I believe it can be done. And therefore such may be ordered. It is not the purpose, counsel, to in this ruling to try and hide anything but to simplify the issues for trial."

This should be coupled with the other arguments with the Court where the Court accepted the interrogatories on file in the case in lieu of any testimony as to the value of any articles lost or damages suffered, and then denied the defendant the right to cross-examine the plaintiffs on the matters set forth in the interrogatories, permitting the defendant only to examine the plaintiffs with relation to the testimony introduced in chief which in no way attempted, or even made an effort to prove the actual damages claimed to have been suffered. The entire record is full of the same acts.

Mr. Butcher, attorney for the plaintiffs, called the following witnesses: Jimmy Weeks, Mike Cullinane, Ole Franz, Tommy Judson, Tom Mulcahy and Ben Holbrook, and made certain proof as to the fire and what took place, and then rested upon the interrogatories filed in the case and never once made the slightest effort to prove the extent of the damages suffered by any of the plaintiffs. The defendant was not permitted to cross-examine any of the witnesses on the extent of damages suffered by them and was not even permitted to cross-examine the witnesses while on the witness stand as to the statements made by them in answer to the interrogatories. This same thing happened with each and every witness all the way through the case down to the time the deposition of Jesse Hobbs was introduced. (Tr. 321-369.)

**ARGUMENT.**

The first and second statements of points relied upon are hereby grouped for argument. They are as follows:

1. THE COURT ERRED IN HOLDING THAT THE ANSWERS TO THE INTERROGATORIES SUBMITTED FOR DISCOVERY BY THE DEFENDANT IN THIS CASE AND THE ANSWERS GIVEN BY THE VARIOUS PLAINTIFFS WAS COMPETENT EVIDENCE, AND IN ALLOWING THE SAME TO BE INTRODUCED IN LIEU OF ANY EVIDENCE AS TO THE NUMBER AND KIND OF ARTICLES DESTROYED AND THE VALUE THEREOF, IN LIEU OF DIRECT EVIDENCE OF THE WITNESSES, EVEN THOUGH THEY WERE PRODUCED IN OPEN COURT, AND THE DEFENDANT WAS DENIED THE RIGHT TO CROSS-EXAMINE THE WITNESSES ON THE THEORY THAT THE ANSWERS GIVEN TO THE DISCOVERY INTERROGATORIES WERE FINAL AND THE JUDGMENT HEREIN WAS BASED THEREON.
2. THERE WAS NOT A WORD OF EVIDENCE PRODUCED AT THE TRIAL AS TO THE AMOUNT AND KIND OF PROPERTY LOST OR THE VALUE THEREOF OR THE DAMAGES SUFFERED BY THE FOLLOWING NAMED PERSONS: JIMMY WEEKS, MIKE CULLINANE, OLE FRANZ, TOMMY JUDSON, TOM MULCAHY, AND BEN HOLBROOK, AND THE JUDGMENT AS RENDERED WAS BASED SOLELY UPON THE ANSWERS TO THE DISCOVERY INTERROGATORIES SERVED BY THE DEFENDANT AND ANSWERED BY THE VARIOUS PLAINTIFFS AND FILED IN THE CASE; THIS PART OF THE RECORD BEING INTRODUCED OVER THE OBJECTION OF THE DEFENDANT, WHICH THE DEFENDANT CONTENTS WAS NEVER ADMISSIBLE AS EVIDENCE, AND THE MOTION FOR JUDGMENT OF DISMISSAL AT THE CLOSE OF THE PLAINTIFFS' EVIDENCE AND AT THE CLOSE OF ALL OF THE EVIDENCE, AS TO EACH OF THE LAST ABOVE NAMED PLAINTIFFS, SHOULD HAVE BEEN SUSTAINED, THERE BEING NO EVIDENCE OF LOSS OF PROPERTY OR THE VALUE THEREOF OR THE DAMAGES SUFFERED, IF ANY.

Rule 33, of the Federal Rules of Civil Procedure, authorizes either party to serve on the adverse party

interrogatories after the commencement of the action, and provides that the interrogatories be answered separately and fully, in writing, under oath. These interrogatories were specifically for discovery purposes and were never intended as evidence in the case. Paragraph 778, *Federal Practice and Procedure*, Barron & Holtzoff, under Rule 33, states:

“778. Use of Answers to Interrogatories

Answers to interrogatories are not considered evidence unless offered as such at the trial. As originally adopted, Rule 33 contained no provision as to the use of answers to the interrogatories at the trial. It was held that such answers could be introduced in evidence *by the interrogating party* as admissions against interest on the *part of the answering party*, or for impeachment, *but that a party could not generally introduce his own answers to his opponent's interrogatories, since they would be self-serving statements.* \* \* \*”

Rule 33 provides for the submitting of interrogatories to the parties, by the adverse party in the action, and Rule 33 as amended reads as follows:

“Interrogatories may relate to any matters which can be inquired into under Rule 26 (b), and the answers may be used to the same extent as provided in Rule 26 (d) for the use of the deposition of a party.”

Apparently Rule 26 (b) is controlling as to the admissions in evidence of any portion of the answers to the interrogatories 26 (b) or the pertinent portion thereof is as follows:

“(b) *Scope of Examination.*

*Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. \* \* \**

Then to clarify Rule 26 (b) above stated, we quote 26 (d) as follows:

“(d) *Use of Depositions.*

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used *against any party* who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) *Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.*

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, *that the witness is*

*dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used \* \* \*'. (Emphasis ours.)*

We have many cases holding that the deposition does not become evidence in the case until offered as such and received as evidence by the Court, and Barron and Holtzoff, Volume 2, that we have used above to quote from, was copyrighted in 1950 and the amendments to Rule 33 and to Rule 26 were adopted December 27, 1946, and for some reason did not become effective until March 19, 1948, and the works of Barron and Holtzoff being copyrighted more than two (2) years thereafter, contain the rules as amended. So apparently there is no other amendment affecting these two (2) rules, and under Rule 33, we find cited the case of *Bailey v. New England Mutual Life Insurance Company of Boston, Massachusetts*, 1 F.R.D. 494. This seems to have been the first case that we were able to find directly in point. The second syllabus of the above case reads:

## “2. Courts.

The answers to interrogatories to adverse parties, taken under Federal Rule of Civil Procedure No. 33, may be used as a confession or for impeachment under the general rule of evidence and not because the rule itself so provides, *but may not be used by the answering party as a self-serving statement, free from the hazards of cross-examination.* Federal Rules of Civil Procedure, rules 26, 33, 28 U.S.C.A. following section 723c. \* \* \*” (Emphasis ours.)

And from the body of the opinion we quote:

“[2] The answers, not because Rule 33 so provides, but, under the general rule of evidence, may be used, as a confession, or for *impeachment but not by the answering party as a self-serving statement free from the hazards of cross-examination.* \* \* \*”

And then quoting from syllabus 6, same case, as follows:

## “6. Courts.

Where plaintiff in preparing his case for trial served upon defendant written interrogatories to be answered as provided by Rule 33 of the Federal Rules of Civil Procedure, and after answering the interrogatories defendant, within 15 days, served a copy of the answers on plaintiff *defendant was not entitled to offer the answers to the interrogatories in evidence over plaintiff's objections.* Federal Rules of Civil Procedure, rule 33, 28 U.S.C.A. following sec. 723c. \* \* \* \*” (Emphasis ours.)

Another case that it quite early and apparently in point is *United States v. General Motors Corporation, et al.*, 2 F.R.D. 528. The fourteenth syllabus reads as follows:

“Answers to interrogatories do not become ‘evidence’ in the case unless voluntarily *introduced by interrogator as admissions against interest* on part of party being interrogated. Federal Rules of Civil Procedure, rule 33, 28 U.S.C.A. section 723c. \* \* \*”

And from the body of the opinion on page 532, we quote:

“\* \* \* but if the answers are not satisfactory or useful, the time spent in considering them and the objections thereto is generally wasted, because the answers do not become evidence in the case unless voluntarily introduced *by the interrogator as admissions against interest on the part of the party interrogated.*”

Another case that is in point is *Coca Cola Company v. Dixi-Cola Laboratories, Inc.*, 30 F. Supp. 275. The eighth syllabus is directly in point and reads as follows:

“8. Courts.

Answers to interrogatories do not become evidence in the case unless voluntarily *introduced by the interrogator as admissions against interest on the part of the party interrogated.* Rules of Civil Procedure for District Courts, rules 33, 37, 28 U.S.C.A. following section 723c.” (Emphasis ours.)



This syllabus is supported in the opinion on page 270, and we wish to quote the following:

“\* \* \* The purpose of the interrogating party is to develop information or force admissions; but if the answers are not satisfactory or useful, the time spent in considering them and the objections thereto is generally wasted, *because the answers do not become evidence in the case unless voluntarily introduced by the interrogator as admissions against interest on the part of the party interrogated.*” (Emphasis ours.)

Another case decided February 8, 1951, by the United States District Court in the Western District of Pennsylvania is identical as to the facts in many ways with the case at bar. This is *United States v. Smith*, 95 F. Supp. 623 and the ninth syllabus is supported throughout the opinion and, therefore, we would like to quote the ninth syllabus as it is concise and to the point.

“9. Federal civil procedure.

In action by the United States against landlord to recover rent overcharges under the Housing and Rent Act of 1947, as amended, it would not be proper for landlord to establish defense by use of interrogatories relating to amount of rental which landlord contended she had received from tenant *since they were mere self-serving statements and had no evidentiary value.* Fed. Rules Civ. Proc. rule 33, 28 U.S.C.A.; Housing and Rent Act of 1947, 206 (a, b), as amended, 50 U.S.C.A. Appendix 1896 (a, b).” (Emphasis ours.)

It seems difficult to find a large volume of cases on this question, as apparently very few efforts have been

made to transgress the old standard rules as to the admissibility of evidence, and apparently the only time that a witness has appeared in Court and testified in the case, and the lawyer representing the witness stopped his testimony at a certain point and then introduced the interrogatories and answers as the evidence, and the only time that we are able to find where the trial judge allowed this to be done is the case at bar.

It should be clearly brought out that there was some evidence as to damages suffered in the portions of the case affecting the cause of action in favor of Roy Callaway and the deposition taken by the plaintiffs effecting the claim of Jesse Hobbs. There was no testimony of any damages suffered or the value of any property lost, save and except the interrogatories that were introduced, over defendant's objections, for and on behalf of Jimmy Weeks, Mike Cullinane, Ole Franz, Tommy Judson, Tom Mulcahy, and Ben Holbrook, and the judgment rendered in favor of these plaintiffs was based *solely*, as far as any damages suffered or property loss, on the interrogatories and answers by these said plaintiffs themselves, and were purely self-serving declarations, and were not competent evidence, and were introduced over the objections of the defendant while each of the plaintiffs, above named, were present in Court, and, therefore, were not the best evidence, and were not admissible, and a judgment based thereon is lacking in any evidence whatsoever as to any damages suffered or any property loss, and, therefore, the Court should have sus-

tained the defendant's motions to dismiss said plaintiffs' causes of action, or in the alternative, to render judgment for the defendant, as to the said defendants above named, and the Court having refused to do this, made a reversible error, and the judgment is erroneously entered and should be reversed with an order directing the lower Court to render judgment for the defendant.

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### SECOND ARGUMENT.

Third and fourth statements of points will be grouped under this heading and argued together. They are:

"3. That the only testimony given in the trial of the case from the witness stand as to loss of property and the value thereof, was that of Roy Callaway, who was the first Plaintiff called as a witness, and by the deposition in support of the claim of Jesse Hobbs. A different rule of law applied as to the error committed by the Court in overruling the Motions to Dismiss as to these two particular Plaintiffs, due to the fact that there was evidence introduced as to the loss of articles and as to the value thereof by these two Plaintiffs, and our contention as to the error committed as to these two Plaintiffs is:

(a) That the Judgment was based upon an erroneous conclusion as to the proof of value and based upon the wrong measure of damages;

(b) That no cause of action in favor of these two particular Plaintiffs, or any of the Plaintiffs, was actually proven;

4. Defendant contends that the undisputed evidence shows that Haskell Plumbing and Heating Company, Defendant, did not furnish the food or lodging to any of the Plaintiffs; that that was furnished by the general contractor, Gaasland Company, Inc., as is shown by the depositions of F. Murray Haskell and Douglas Blair, which stand undenied by any one."

The evidence most favorable to the plaintiffs, Roy Callaway and Jesse Hobbs, was to the effect that one of the plaintiffs, to-wit: Jimmy Weeks, testified (Tr. 248):

"A. I seen the bull cook, or whatever he was, put it in one day. He was filling the barrels. I went back to the barracks one afternoon, I run out of cigarettes, and went back to the barracks and he was filling the tanks while I was there, and I stopped and talked to him and watched him fill the tanks.

Q. And what was he doing?

A. He was filling the tanks.

Q. And what was he putting in the tanks?

A. Well, he had a pump and he pumped in diesel oil, and then out of another barrel he pumped in gas.

Q. Did you call his attention to the feature of that?

A. Yes, and he said, 'we are hoping this will stop the stoves carboning up like they have been carboning up.'

Q. You called his attention to the fact that he was mixing gasoline with fuel oil?

A. Yes.

Q. Now I don't want you to tell me what he said. Did you go any further than that; did you point out anything to him?

A. Well, I pointed out it was a poor practice.

Q. For what reason?

A. Gasoline and oil doesn't mix too well. If they happen to not mix too well and had to settle, the gasoline would hit that stove straight. It is very possible it could cause an explosion." (Testimony of Lyle Wesley Franz.)

Then on cross-examination commencing on Tr. 259-261 you find practically every word of the testimony that in any way purports to show negligence on the part of anyone for the cause of the fire:

"Q. Now, what day was it you went after the cigarettes?

A. I would say the first part of August—the first part of October. Pardon me.

Q. And they had a 50 gallon barrel at the time there, and connected to the stoves, did they?

A. Yes.

Q. And this man was filling that 50 gallon barrel?

A. There was more than one 50 gallon barrel on the stand. I forget, I believe there was three.

Q. And were they all fastened together or not?

A. Yes. They was hooked up together.

Q. *Do you know who that fellow was that you saw around the place. You don't know what his name was—*

A. No—

Q. *Do you know any connection he had there?*

A. No, I don't.

Q. *Had you even seen him before?*

A. No.

Q. *Had you ever seen him around the cooking place—or the eating place?*

A. *Not that I remember of.*

Q. *You just happened to see him that one time there?*

A. *That's true.*

Q. Now what—Excuse me, Your Honor, I will pass this right back. (Gave file to Court.)

The Court. You may keep it if you wish.

Mr. Bell. No, thank you.

Q. (by attorney for defense). When you ate there, you ate with about a hundred or a hundred and fifty people there, did you not?

A. Possibly. I suppose, yes.

Q. *After you saw this then, you went right on staying in the place; after you knew this was a dangerous process, you went right on staying there, did you?*

A. Yes.

Q. And you told the job steward, and you told other people about this dangerous system, did you?

A. Yes.

Q. And then you kept right on staying?

A. Yes." [167]

"Q. *You knew it was very dangerous, didn't you. To mix gasoline with oil and for a stove?*

A. Yes.

Q. *You knew it was very dangerous, didn't you?*

A. Yes.

Q. *And you went on and stayed just the same?*

A. Yes.

Q. Where did you stay after the fire?

A. We moved into another barracks.

Q. Where was the other barrancks?

A. Well, in the same area.

Q. There was a lot of barracks there, were there not?

A. True.

Q. And did you know the Gaasland people—Gaasland Construction Company?

A. Not personally. No.

Q. You knew they were the general contractors on the job?

A. Yes.

Q. *And of course when that barracks burned, they took you to some place else to stay, did they?*

A. Yes.

Q. Was it a similar barracks?

A. Somewhat similar.

Q. Now, why do you say this was a bull cook that you saw mixing that?" [168]

"A. I don't recall saying he was a bull cook. I said he could have been a bull cook. I do not know what he was.

Q. You don't know whether he was a bull cook or not?

A. No, I don't.

Q. I see. You say you went after these cigarettes about October first?

A. The first part of October, yes.

Mr. Bell. All right, that's all."

Then you read this in connection with the depositions of Douglas Blair (Tr. 389) who testified that he was an accountant and was familiar with the enterprise at King Salmon being constructed by Gaasland Construction Company. He was assistant secretary and acting office manager and accountant for Gaasland

Company during that period. He saw all the subcontracts, pay rolls, and agreements; that Gaasland Company was the prime contractor on that job, and there were a number of subcontractors, including Haskell Plumbing and Heating Company. On Tr. 391 you find this testimony:

“Q. Now what was the arrangement between Haskell and Gaasland Companies regarding the board and lodging of Haskell’s employees at Naknek?

A. The arrangement was that Gaasland Company should operate a camp where room and board would be furnished to their own employees, those of Haskell Plumbing & Heating Company, as well as those of other subcontractors on the job.

Q. Did these various subcontractors, including Haskell, have any direct hand in the management of the boarding and lodging camp?

A. None whatsoever.

Q. Whose employees operated that boarding and lodging camp?

A. The employees of Gaasland Company, Incorporated.

Q. And to whom did the hut belong which burned in October of 1951 in which these plaintiffs were lodged?

A. I wouldn’t state to whom it belonged. The camp proper belonged to the C.A.A., was leased by them to the Alaska Salmon Industry, and with the permission of the C.A.A. by the Alaska Salmon Industry to Gaasland, so that Gaasland was not the owner of any of the buildings. However, all of the buildings were operated by and under the jurisdiction of Gaasland Company.



Q. Who hired the camp steward?

A. We hired the camp steward, the cooks, the bull cooks, and any other personnel working in the camp.

Q. Who inspected and maintained the Quonset huts in which the subcontractor's employees lived?

A. All of the camp was inspected and maintained by Gaasland Company. I would assume the inspections to be made by the camp manager.

Q. And who was that in October of 1951; do you recall?

A. I believe it to have been Lee Post, who was camp manager there. The previous camp manager was named Joe Nord, but I believe that he was gone and had been replaced by Post at that time.

Q. Now, you used the expression 'bull cook.' What is a bull cook?

A. The bull cook was an employee who cleaned quarters, made beds, changed linen, and was generally responsible for keeping the camp and quarters in a neat orderly condition.

Q. Who purchased the groceries that were eaten by the plaintiffs and the other subcontractors' employees?

A. Gaasland Company.

Q. And who purchased the fuel oil which was burned to keep the Quonset huts warm?

A. Gaasland Company.

Q. And do you know what kind of fuel was burned in the Quonset hut in question?

A. No, I do not. To the best of my knowledge all of them were heated by stove oil supplied by the Standard Oil Company of California at Nakhnek. It was barged up river to the job.

Q. Was there a written contract between Haskell and Gaasland providing for the lodging and boarding of these plaintiffs and other Haskell employees?

A. To the best of my recollection there was no such agreement.

Q. What was the arrangement?

A. As I recall, one of the provisions of the agreement with Haskell Plumbing & Heating Company was that they should be compensated for all of their costs in connection with their subcontract, and that they should receive a certain additional amount over and above the costs. There was, therefore, no object in Gaasland Company's billing subsistence and quarters to Haskell only to have Haskell bill them back to Gaasland Company. That, to the best of my recollection, explains the absence of any agreement as to a specific amount to be charged.

Q. Gaasland just picked up the check as it came along?

A. That is correct.

Q. I see. To your knowledge did the Haskell Company at any time undertake the inspection and maintenance of the Quonset hut in question prior to the time of the fire?

A. I am sure they did not." (Deposition of Douglas Blair.)

Then F. Murray Haskell testified that he was secretary of the Haskell Plumbing and Heating Company, Inc., in October, 1951, and at the time of the fire involved herein, he took part in the active management of the corporation. (Tr. 394.) He testified that he was familiar with the Quonset hut which was involved

in the fire. That it was not the property of the defendant, Haskell Plumbing and Heating Company, Inc., and belonged to Gaasland Construction Company and had never belonged to Haskell Plumbing and Heating Company, Inc. That the Haskell Plumbing and Heating Company had never undertaken the maintenance of that hut and its equipment where the plumbers, who were hired by the Haskell Plumbing and Heating Company, were living. At first the plumbers were kept at the Sky Motel and Gaasland Construction Company paid for their keep. None of the bills for board and room for the plumbers were ever sent to or paid by the Haskell Plumbing and Heating Company, Inc. The plumbers stayed there approximately two (2) months. Then Gaasland Construction Company made the Quonset hut available for the plumbers. Then Gaasland Construction Company arranged for all eating and rooming for all subcontractors. The facilities were purchased by the subcontractors from the Gaasland Company by the man-day of the general contractor, which was Gasland Construction Company (Tr. 396-397) the same as all other subcontractors on the site. Haskell Plumbing and Heating Company paid a per man-day rate for the care of their employees, and all facilities were provided by Gaasland Company. Gaasland Construction Company hired all the personnel to take care of the eating and housing, and also the hot water heater and heating facilities in those huts. That at no time did Haskell Plumbing and Heating Company provide or maintain housekeeping facilities, had no staff which

provided lodging or messing facilities for any of the people. They had no bull cooks, and the Gaasland Company furnished all board and lodging facilities. (Tr. 398-399.)

Then after this evidence was in, the case was closed, and the defendant moved to strike all the testimony as to both, the oral and the interrogatories, before the Court. Then a separate motion was made to strike the interrogatories for the reason that they were not admissible in evidence at all, and were not the best evidence. Then it was moved to dismiss the entire case for the reason that there was no cause of action proven against the defendant, Haskell Plumbing and Heating Company, Inc. Then (Tr. 411) after additional proceedings took place, the defendant moved to strike all of the testimony on the same grounds set up in the motion to dismiss which included a motion to dismiss on account of failure of the complaint to state a cause of action; and that there was a misjoinder of parties. These two motions were denied. Then defendant moved to strike the interrogatories on the theory that they were improperly introduced and were not competent evidence. This motion was overruled. Then defendant moved to strike the plaintiffs' Exhibit number one, which is a contract referred to and introduced, over the objections of the defendant, which shows on its face to be a contract between the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the employers of the group named, for the reason Haskell Plumbing and

Heating Company, Inc., was not a party to the contract and is not binding on it. This motion was denied. Then the defendant moved to dismiss plaintiffs' action on the grounds that there was no competent evidence as to any damages suffered and there had been no competent evidence of the value of the property lost, and no evidence of negligence or breach of duty on the part of the defendant. All motions were both joint and several as to all plaintiffs.

The second argument should be divided into three subdivisions, and we will proceed to argue them as follows:

A. There was no evidence of any negligence whatsoever on the part of Haskell Plumbing and Heating Company, the only defendant herein; that there was no testimony offered anywhere to the effect that an agent, servant, employee, or any officer of said corporation committed any act of negligence or omission of duty to the plaintiffs or any of them. The testimony above quoted is the sole and only testimony of any negligence of anyone, and the witness who testified to it did not know who the man was, that he claims mixed the gasoline with the stove oil; does not know for whom he was working or by whom he was employed, if at all; does not know of any negligence whatsoever of any one that would bind the defendant. For the sake of argument, let us assume that there was negligence that took place by mixing this gasoline with stove oil; then somebody might be liable, but the Court would have to look far beyond the evidence adduced to determine whose negligence caused the

damages and certainly the defendant, Haskell Plumbing and Heating Company, was not negligent, as the evidence shows conclusively that the man referred to as mixing the gasoline and stove oil was not an employee, agent, servant, or officer, or in any way connected with the defendant, and to make the defendant liable, there must be evidence to connect the negligence of this said man with the defendant, or the motion of the defendant for a judgment in its favor should have been sustained.

We have had a great deal of disappointment in trying to find a case directly in point, but there seems to be none. However, the law involved in the case is rather definite and certain.

We call your attention to the case of *Russell v. Oregon Short Line R.R. Co.*, 155 F., p. 22. The first syllabus reads as follows:

“1. Trial—Direction of Verdict—Questions of Negligence. While questions of negligence are ordinarily for the jury in federal courts, a case may be withdrawn from the jury and a verdict directed for plaintiff or defendant, as may be proper, where there is no conflict in the evidence, or where it is so conclusive in its character that the court, in the exercise of its sound judicial discretion, would be obliged to set aside a verdict rendered in opposition to such evidence.

(Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, 376-395; vol. 37, Negligence, 277-286.)”

We are citing the syllabus only in this case, as the body of the opinion supports it conclusively, and especially the quotation starting on page 25.

In a later case, *Shewmaker v. Capital Transit Co.*, 143 F. (2d) 142, the second and fourth syllabuses read as follows:

“2. Negligence 136(9).

In action founded on negligence, where no reasonable man could reach a verdict in favor of plaintiff, defendant’s motion for directed verdict should be granted.”

“4. Negligence 136(5).

In a negligence action, the burden is on plaintiff to establish negligence and injury alleged, and, if evidence fails adequately to support either element, defendant’s motion for directed verdict should be granted.”

This same rule is found in the following cases:

*Capital Transit Co. v. Gamble, et al.*, 160 F. (2d) 283;

*Abbott v. Railway Express Agency*, 108 F. (2d) 671;

*Seregos, et al. v. C. W. Good, Inc.*, 193 F. (2d) 741.

There being no evidence of any kind that the man who was seen mixing this oil to be an employee of the defendant or in any way connected with the defendant, and not even a scintilla of testimony of negligence on the part of the defendant, then the Court should have sustained the defendant’s motion to dismiss or should have rendered judgment for the defendant and against all of the plaintiffs.

B. The plaintiffs testified of the knowledge of the danger of mixing gasoline with stove oil; testified of

reporting this matter to at least a part of the other plaintiffs herein and admitted going on living in the premises knowing explicitly the danger involved and, therefore, assumed the risk.

65 Corpus Juris Secundum, 848, Section 174, reads:

“Under a doctrine referred to as the doctrine of assumed or incurred risk, and on the basis of the maxim, ‘Volenti non fit injuria’, is the rule that one who voluntarily exposes himself or his property to a known and appreciated danger due to the negligence of another may not recover for injuries sustained thereby.”

This is so universally held that a citation of a lot of authority would be an imposition on this Court, but we will cite in support thereof, the case of *Surface v. Safeway Stores, Inc.*, 169 F. (2d) 937, and will quote from the body of the opinion on page 942, as follows:

“ ‘The maxim “volenti non fit injuria” means: *If one, knowing and comprehending the danger, voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom.* The maxim is predicated upon the theory of knowledge and appreciation of the danger and voluntary assent thereto.’ 12 N.W. 2d at pages 84, 88.” (Emphasis ours.)

C. The testimony above quoted shows that the plaintiffs well knew of the dangers in living in the Quonset hut, after seeing and knowing of the mixing of the oil and gasoline, and their action in continuing to live there and making no effort to correct the con-



ditions known by them to be dangerous, made them guilty of contributory negligence, and the Court should have sustained the defendant's motion for judgment at the close of all of the evidence as well as at the close of the plaintiffs' testimony, and the failure of the Court to sustain the defendant's motion, therefore, we contend was error.

We quote in support of the above statement, from *Cary Bros. & Hannon v. Morrison*, 129 F. at 177, the third and fourth syllabuses, as follows:

"3. Same—Unheeded Warning—Contributory Negligence.

It is the duty of one who is lawfully using property near to that upon which another is legally engaged in blasting, and who is warned of a coming explosion, to use reasonable diligence to escape from danger on account of it; and failure to exercise such care, which concurs in producing his injury, waives his right of action for the trespass, and constitutes contributory negligence, which is fatal to his action for damages for the injury."

"4. Contributory Negligence—Question for Jury. Exception.

The question whether or not one is guilty of contributory negligence is ordinarily for the jury. It is only when the facts which condition the question are stipulated, or are established by testimony which is free from substantial conflict, and the inference from the facts is so certain that all reasonable men, in the exercise of a fair and impartial judgment, must agree upon it, that the question of contributory negligence may be lawfully withdrawn from the jury."

We have mentioned assumption of risk and contributory negligence solely as a precautionary measure in case this Honorable Court should overrule the former arguments. We think that the question of contributory negligence is elementary in this case, because there is no evidence to indicate that the defendant knew or had any reason to know or believe that gasoline was being mixed with the oil used in the Quonset hut where the plaintiffs were sleeping, as the evidence is conclusive that the defendant had nothing to do with the maintenance of the Quonset hut or the heating thereof, and there is indisputable evidence that the plaintiffs themselves knew of the mixing of this oil, knew it to be extremely dangerous, and then voluntarily continued to live in the Quonset hut, and continued to leave their personal property there and we feel that contributory negligence was proven by a statement of facts made on the part of the plaintiffs themselves, and nowhere denied or modified. Therefore, it had become conclusive and it was the duty of the Court to dismiss the plaintiffs' causes of action and/or render judgment for the defendant.

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### CONCLUSION.

In conclusion, we wish to emphasize the fact that we believe that the question covered under Argument One should be conclusive as to all of the parties except Roy Callaway and Jesse Hobbs, and if our contention is right, then there is no evidence of any damage suffered or loss sustained as to all of the rest of

the plaintiffs, and Argument Two clearly sets forth our contention to the effect that there was no negligence proven on the part of the defendant and no connection made between the defendant Haskell Plumbing and Heating Company, and the only act of negligence complained of was the fellow that put some gasoline in the oil in the tanks, and it was clearly established and undenied that Gaasland Company furnished the barracks, furnished the oil, took care of the barracks, and fed the men, and surely the plaintiffs have sued the wrong corporation as the defendant herein. This being established, conclusively, and undenied, we believe the judgment of the lower court should be reversed as to all plaintiffs, and the judge of the lower Court should be directed to enter judgment dismissing all of the plaintiffs' causes of action and enter judgment for the defendant.

Dated, Anchorage, Alaska,  
November 4, 1955.

Respectfully submitted,

BELL, SANDERS & TALLMAN,  
By BAILEY E. BELL,

*Attorneys for Appellant.*



No. 14,724

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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HASKELL PLUMBING AND HEATING COMPANY,  
INC., a corporation authorized under the  
laws of the State of Washington and do-  
ing business in the Territory of Alaska,  
*Appellant,*

vs.

JIMMY WEEKS, TOMMY JUDSON, MIKE CUL-  
LINANE, OLE FRANZ, ROY CALLAWAY, TOM  
MULCAHY, BEN HOLBROOK and JESSE  
HOBBS,

*Appellees.*

On Appeal from the District Court for the  
Territory of Alaska, Third Division.

**BRIEF OF APPELLEES.**

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HAROLD J. BUTCHER,  
Anchorage, Alaska,  
*Attorney for Appellee.*

FILED

JUN 19 1953

U. S. DIST. COURT, ANCHORAGE



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IN THE  
**United States Court of Appeals**  
**For the Ninth Circuit**

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HASKELL PLUMBING AND HEATING COMPANY,  
INC., a corporation authorized under the  
laws of the State of Washington and do-  
ing business in the Territory of Alaska,  
*Appellant,*

vs.

JIMMY WEEKS, TOMMY JUDSON, MIKE CUL-  
LINANE, OLE FRANZ, ROY CALLAWAY, TOM  
MULCAHY, BEN HOLBROOK and JESSE  
HOBBS,  
*Appellees.*

**On Appeal from the District Court for the  
Territory of Alaska, Third Division.**

**BRIEF OF APPELLEES.**

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**JURISDICTION.**

The appellees concede that the District Court for the Third Division, Territory of Alaska, has jurisdiction in this proceedings by virtue of 48 USCA, Section 101 and Section 53-1-1, 1949 Alaska Compiled Laws Annotated. The appellees also concede that the United States Court of Appeals for the Ninth Circuit has jurisdiction on appeal as stated by appellant.

**THE FACTS.**

Appellees believe that the following facts are more in accord with the evidence adduced at the trial of the case than the facts stated by the appellant in its brief.

The plaintiffs were plumbers who had been dispatched by their union to work for the defendant at King Salmon, Alaska. This station was 300 air miles from Anchorage in a wilderness area where the defendant had a contract to provide the plumbing and heating work on a construction project for the United States government.

The conditions under which the plaintiffs were to work had been made the subject of a written contract between the Plumbers Union and the defendant (R. 426) and amongst other terms and conditions there was a provision that the defendant would furnish room and board to the plaintiffs, paragraph 6 (a), plaintiffs' Exhibit No. 1 (R. 438).

The plaintiffs, upon arrival at the construction site, were taken by the defendant (R. 216) to a barracks building, in which each man was assigned a bed and a space to store his gear. This building was heated by two oil burning stoves and had washroom facilities as well as other conveniences (R. 153, 155).

On October 11, 1951, while the men were at work the building and its contents were destroyed by a fire caused by an explosion in one of the stoves.

The explosion resulted from defendant's negligence in permitting to be used a type of fuel oil for heating

purposes containing 10% gasoline, which gasoline had been added to the regular fuel oil by the "Bull Cook" (R. 259). The addition of gasoline in the quantity indicated created a fuel with a flash point so low as to make it dangerous to use in heating stoves (R. 248, 295, 296). This mixing of gasoline with fuel oil, plaintiffs accidentally discovered (R. 248), and subsequently reported to defendant's superintendent, pointing out to him the dangers incident to the practice and suggesting its discontinuance (R. 273). The superintendent admitted that it was not a safe practice and assured plaintiffs that the use of such fuel oil would be stopped (R. 273).

Nine plaintiffs lost personal property in the fire consisting of tools, clothing, luggage, rifles, watches, cameras, portable radios, electric razors, and other miscellaneous items in the aggregate value of \$8,528.01, which loss was the basis for a complaint filed against the defendant (R. 3) in which the plaintiffs joined as parties under FRCP 20. The defendant attacked this joinder contending that the plaintiffs should have filed separate complaints, but the Court denied this motion, and the defendant then filed its answer (R. 18) generally denying the allegations of the complaint but failed to plead an affirmative defense. Shortly after the filing of the answer the defendant prepared and served upon plaintiffs nine separate sets of interrogatories to be answered. Each set consisted of between fifty and sixty general questions, most of which questions were not single inquiries but were multiple in form containing numer-

ous other inquiries from which for purposes of illustration we select two at random which are fairly typical of all:

“48. Please state how many dress shirts you had burned in this fire, describe the dress shirts that were burned. Please state the name and address where you purchased said shirts, state the price you paid therefor, and state the length of time you had worn these shirts. Please state the design and color thereof.” (R. 293.)

“51. Please describe the two sweaters that you claim to have lost in the fire. Please give the name and address from whom you purchased each of the sweaters. Please give the price paid therefor. Please give the date or approximate date of the purchase thereof. Please state whether or not they were extensively used prior to the fire.” (R. 65.)

Thus each set directed as it were to each of the nine original plaintiffs required each of them to answer literally hundreds of questions, pushing the liberal provisions of Rule 33 to limits not heretofore observed in any previous set of interrogatories. Plaintiffs excepted to the interrogatories on the grounds, among other things, that the questions represented a comprehensive inquiry into the entire case in the nature of cross-examination and were intended to harass the plaintiffs and discourage the prosecution of the suit, but at the time set for argument on these exceptions, when it appeared that the arguments might perhaps be more time-consuming than the trial of the case, the plaintiffs waived these exceptions, and

thereafter the interrogatories were answered by plaintiffs, served on defendant and filed in the case on April 2, 1954.

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### THE TRIAL.

The plaintiffs opened their case and introduced the contract of employment (R. 426) following which plaintiff Callaway testified in support of plaintiffs' case and established the fact that he was dispatched to work for defendant at King Salmon, Alaska, and that he was furnished quarters in the barracks building by the defendant (R. 153, 156). He described the fire (R. 154) and the loss of his personal property (R. 156 to 166). On cross-examination counsel for the defendant required Callaway to minutely describe the personal property he lost in the fire, such as socks, undershirts, shoes, and scores of other articles, demanding to know where and when the items were purchased, the price paid, the color of each, how long each item had been worn and other similar information in great detail (R. 166 to 210).

At this point the Court (R. 201), taking notice of the consequences in time consumption of pursuing the above described type of examination as to the property lost by the other plaintiffs, noted that each of the plaintiffs had fully answered similar questions put to them by the defendant in the interrogatories and suggested that the interrogatories and answers be offered in evidence on behalf of plaintiffs as to proof of the

property lost by plaintiffs and the value thereof. The interrogatories and the answers were then offered in evidence and the Court admitted them (R. 202, 208) but limited their use to proof of loss and the value of the articles of property only. Defendant objected on the grounds that answers to interrogatories were not admissible in evidence but were limited by Rule 33 to "discovery" only (R. 203 to 205).

Pursuant to the Court's ruling the other plaintiffs limited their testimony to employment with the defendant, the fire and cause thereof, the negligence, the housing furnished by defendant, and stood on their previous answers by way of interrogatories as proof of loss of property.

Leo Edward Krupa, a petroleum expert, was qualified as such, and testified (R. 292) that fuel used in heating equipment consisting of regular fuel oil, to which had been added 10% gasoline, would create a fuel with a flash point so low as to make it dangerous. Upon completion of this testimony the plaintiffs rested.

Defendant after renewing its motion to dismiss and it being denied, introduced two depositions, representing defendant's entire case, one for witness Douglas Blair and one for witness F. Murray Haskell; the latter testified on direct examination that he was Vice President of Haskell Plumbing and Heating, Inc. (R. 394), and that his company did not own the barraeks building in which the men were housed and which was lost in the fire, and that it was not responsible for its upkeep and that he had hired an independent contrac-

tor for that purpose, namely Gaasland Construction Company (R. 398).

The Court in admitting into evidence the interrogatories and answers had informed the defendant that it was not precluded from calling witnesses to rebut plaintiff's claims as to loss of property (R. 208) but the defendant called the above named two witnesses only (R. 389, 394) who confined their testimony almost solely to the relationship of the defendant with the general contractor, Gaasland Construction Company, and to the fact that the barracks building belonged to Gaasland and not to defendant, and that the employee who had mixed the explosive fuel was employed by Gaasland and not by defendant.

On cross examination Haskell admitted that he had entered into a contract with the union on behalf of his company (Sup. R. 455, 456), covering the hiring of plaintiffs and that under the terms of that contract his company was responsible for furnishing living quarters (Sup. R. 463), that the plaintiffs had no choice as to where they lived but were compelled to live where assigned (Sup. R. 456, 457, 471), and that there was no other place for them to live (Sup. R. 471).

The defendant called no other witnesses limiting its evidence almost entirely to the method followed by the defendant in using facilities of Gaasland Construction Company, the prime contractor, such as buildings for housing employees, the feeding of employees, and care of the premises. It showed that defendant had a sub-contract to install heating and plumbing systems

for Gaasland Construction Company, who had a prime contract with the United States government at King Salmon.

It showed that the prime contractor, Gaasland, was required to pay defendant for its work on the heating and plumbing; it showed that defendant had an obligation to pay Gaasland for housing and feeding its employees; it showed that defendant and Gaasland worked out a private arrangement by which Gaasland would turn over to defendant a barracks building in which to house defendant's employees and provide a man (bull cook) to be caretaker of the premises, and in addition would provide meals for defendant's employees, and when the job was completed Gaasland would deduct from monies due defendant, for the plumbing and heating work, the monies owed Gaasland by defendant for Gaasland's housing and feeding of defendant's employees (R. 393).

This was strictly a private arrangement between defendant and Gaasland and there is no evidence in defendant's entire case to show that the plaintiffs were informed of this arrangement or that they agreed to look to Gaasland for this room and board. On the other hand the plaintiffs continued to rely on the contract with defendant and looked only to defendant for performance.

The defendant rested following the production of the testimony of Blair (R. 389) and Haskell (R. 394).

Following argument the Court indicated some doubt on the matter of measuring damages and setting a value on the lost property (R. 467). Plaintiffs then



called as their witness one Floyd Lundquist, an experienced insurance adjuster, to establish the depreciated value of the lost property and then rested their case. Following further argument on the merits and on defendant's motion to dismiss, the Court rendered its opinion, finding in favor of the plaintiffs (R. 421).

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### **APPELLANT'S MISSTATEMENTS OF FACT.**

Appellant's brief contains at least four misstatements of fact which are so conspicuous as to make it difficult to understand how the writer could have urged them upon the Court in the face of the testimony set out in the record.

The first of these is where appellant denies that it is a party to a certain contract entered into between the Plumbing and Heating Contractors and the Plumbers' Union. The statement that appellant is not a party to this contract is made several times in its brief, but particularly on page 6, third paragraph, where we find the following statement:

"This was done (introduced into evidence) over the repeated objections of the defendant for the reason that the defendant was not a party to the contract, it being a contract between separate and different parties other than the defendant here."  
(Parenthesis ours.)

and again on page 32 of appellant's brief where appellant says:

"Then defendant moved to strike the plaintiffs' Exhibit No. 1, which is a contract referred to and

introduced, over the objections of the defendant, which shows on its face to be a contract between the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the employers of the group named, for the reason *Haskell Plumbing and Heating Company, Inc., was not a party to the contract and is not binding on it.*" (Emphasis ours.)

Appellant makes the foregoing statements as against the contract itself, plaintiffs' Exhibit No. 1 (R. 426), which was signed for Haskell Plumbing and Heating Company, Inc., by F. Murray Haskell, and in the face of the testimony on cross examination of appellant's own witness, F. Murray Haskell, which appears in the record (Sup. R. 455 to 456) as follows:

"Q. Well, did you have, did Haskell Plumbing and Heating Company, have a written agreement with the plumbers' union?

A. Yes, we did.

\* \* \* \* \*

Q. And was that the only written agreement that existed between any of these plaintiffs and Haskell Plumbing and Heating Company?

A. That is correct.

\* \* \* \* \*

Q. Did the contract provide that these men would be furnished with housing or living facilities?

A. That is correct.

Q. And that they would be furnished room, or board, their meals?

A. That's right.

Q. And this contract also—well, the contract provided that Haskell Plumbing and Heating Company would furnish these facilities to these workmen, didn't it?

A. That is correct."

The second example of appellant's careless handling of the facts appears at pages 24 to 30 of the brief where appellant quotes testimony on direct and cross examination to show that appellees while aware of the dangerous practice of mixing gasoline and oil to burn in the heaters continued to live in the barracks, thus being negligent themselves. Appellant in its brief (P. 24) ascribes this testimony to appellee Weeks, when in fact it is actually the testimony of appellee Franz (R. 248), but the more serious misstatement is where appellant asserts in its brief (P. 25) that the testimony it is quoting is "practically every word of the testimony that in any way purports to show negligence on the part of anyone for the cause of the fire," and then having made this obviously inaccurate assertion appellant compounds the inaccuracy by stating on page 33:

"The testimony above quoted is the *sole* and *only* testimony of any negligence of anyone." (Emphasis ours.)

Contrary to these statements there actually is other very pertinent testimony in the record on the same subject; for instance, Franz, upon discovering that gasoline and fuel oil were being mixed, reported the fact to the superintendent for defendant, one Jules

Ferer, who assured Franz that this practice would be looked into by him and corrected (R. 250, 263). Other testimony on this same point which appellant chooses to ignore is that of the job steward, Mike Cullinane, who, learning from Franz of the use of gasoline with fuel oil also warned Jules Ferer, superintendent for appellant (R. 272) that the practice was dangerous and the superintendent admitted that it was not a safe practice and that this type of fuel would not be used anymore ((R. 273), and further Cullinane says that he relied on these assurances of the superintendent that he would discontinue the use of gasoline in the fuel oil because the superintendent was a very competent man (R. 278).

A further misstatement of fact occurs at page 36 of appellant's brief under "C" where appellant says:

"C. The testimony above quoted shows that the plaintiffs well knew of the dangers in living in the Quonset hut, after seeing and knowing of the mixing of the oil and gasoline, and their action in continuing to live there and making no effort to correct the conditions known by them to be dangerous, made them guilty of contributory negligence, \* \* \*"

We have previously shown that at least two of plaintiffs upon learning that gasoline was being mixed with fuel oil went to defendant's superintendent and informed him of the conditions, warned him of the danger, and elicited from him a promise to discontinue the practice, upon which assurance they continued to live in the building (R. 250, 263, 272, 273, 278).

Appellant has a duty to correctly state the facts even though they might be painful to him, but he again on page 38 says:

“We think that the question of contributory negligence is elementary in this case, because there is no evidence to indicate that the defendant knew or had any reason to know or believe that gasoline was being mixed with the oil used in the Quonset hut where the plaintiffs were sleeping, \* \* \*”

We have shown that the defendant company had a superintendent on the project who had direct supervision over plaintiffs and that two of the plaintiffs (Franz and Cullinane) informed this agent of defendant that a dangerous type of fuel was being used to heat the barracks (R. 250, 272). This would surely indicate beyond a doubt that defendant knew that gasoline was being mixed with fuel oil to heat the barracks. The superintendent's knowledge of this dangerous practice can be imputed to the defendant corporation, he being an agent of the same.

The foregoing are the most glaring examples of appellant's method of quoting selected testimony which supports its position, meanwhile denying the existence of other facts which are against it.

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#### **PRELIMINARY DISCUSSION OF APPELLANT'S POINTS.**

Appellant has urged directly in its brief only four of the eight points contained in its original “Statement of Points” (R. 446). Nevertheless it has at random throughout the brief called attention to other alleged

errors and has argued some of them more or less extensively. Some of these alleged errors, although not specified as such in the brief, were set out in the original statement of points (R. 446) and others were not previously assigned.

Appellees have had some difficulty with the four points specifically urged in appellant's brief because they are not, in our opinion, clearly stated, and they appear to be argumentative to a degree that somewhat obscures the actual error claimed. It is thought that the points ought to be restated in less involved terms, in order to make a more logical response, however, we have endeavored in this brief to grasp the significant features of each error alleged. Other errors claimed by appellant in the brief without specification as "Points" will also be discussed but only because appellant has argued them to a considerable extent. One of the undesignated errors in the brief, namely, to use appellant's phrase—"assumption of risk and contributory negligence"—is urged by appellant through four pages of its brief from 35 to 38, and this extensive argument is made by appellant when neither contributory negligence nor assumption of risk were pleaded in the defendant's answer or raised during the trial.

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#### FIRST ARGUMENT.

(Points One and Two.)

Appellant has grouped its points one and two for argument, as it should have, because, from our point of view, points one and two contain the same alleged

error although couched in somewhat different language. We have therefore, for the purposes of developing an orderly presentation, restated appellant's points one and two as we understand them, leaving out all extraneous matter as follows:

“That the Court erred in admitting into evidence the interrogatories propounded to plaintiffs by the defendant and the answers of the plaintiffs as proof of the property damage sustained by plaintiffs.”

The Court acted within its discretion and in accordance with FRCP 33 and 26(d)(2) when it admitted into evidence the defendant's interrogatories and plaintiffs' answers as a portion of plaintiffs' proof of loss of property and the value of the same.

Appellant has relied on Barron and Holtzoff Section 778 in support of its contention that the interrogatories which it served upon plaintiffs and the answers of plaintiffs were for *discovery purposes only* and were not admissible into evidence (emphasis ours).

The reasoning by which appellant has determined that Section 778 forbids the introduction into evidence of interrogatories and answers is not clear to us for the reason that the language of Section 778 is quite opposite to the meaning found therein by appellant. Section 778 reads as follows:

“778. Use of Answers to Interrogatories.

Answers to interrogatories are not considered evidence unless offered as such at the trial. As originally adopted, Rule 33 contained no provi-

sions as to the use of answers to the interrogatories at the trial. It was held that such answers could be introduced in evidence by the interrogating party as admissions against interest on the part of the answering party, or for impeachment, but that a party could not generally introduce his own answers to his opponent's interrogatories, since they would be self-serving statements. \* \* \*

This language cannot easily be misunderstood. Appellant has inversely concluded that the only part of the foregoing section that has any bearing on the present subject is where the section refers to Rule 33 as originally adopted. Its emphasis of this portion of the paragraph (Brief P. 16), by use of italics, is devoted entirely to that part of Section 778 which describes the rule before it was amended, and appellant's subsequent argument, including the citation of cases, is confined to the rule as originally adopted and avoids the rule as amended. It is difficult for us to understand how appellant could so read Section 778 as to conclude that it confines the interrogatories and answers propounded under Rule 33 to "discovery purposes only" and prohibits their use as evidence. If appellant has misread the first paragraph of Section 778, it is even more difficult for us to understand how it could have misread the second paragraph which is perfectly clear and cannot be misunderstood:

"Rule 33 was amended, effective March 19, 1948, to provide that answers to interrogatories may be used to the same extent as provided in Rule 26(d) for the use of a deposition of a party."



In the face of this authority appellant has attempted to convince this Court that Section 778 of Barron and Holtzoff defines Rule 33 as to preclude the use of interrogatories and answers as evidence and limits its function to discovery only.

If appellant really examined Rule 26(d)(2) it found the following language:

“The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.”

The several cases cited by appellant to support its contention that interrogatories and answers are not admissible in evidence are all cases which were decided between 1939 and 1943 and of course do not reflect the rule as amended. These cases were decided as follows:

*Bailey v. New England Mutual Life Insurance Company of Boston*, 1 F.R.D. 424, 1940;

*United States v. General Motors Corp., et al.*, 2 F.R.D. 528, 1942;

*Coca Cola Company v. Dixie Cola Laboratories, Inc.*, 30 F.Supp. 275, 1939.

The case of *Smith v. United States* cited by appellant was decided in 1951 and does reflect the amended rule, but this case is not a companion case with the three cases set forth above and in fact holds that interrogatories and answers *are* admissible under Rule 33 as amended in 1948, and then distinguishes the case

by showing that if such interrogatories or answers are objectionable because there exists some rule of evidence which might preclude them they may not be admissible. The answers in the Smith case were answers made by the defendant which the Court held to be inadmissible because they were *self-serving* and *not* because answers to interrogatories are inadmissible under Rule 33, as appellant contends (emphasis ours).

Appellant has also labeled plaintiffs' answers to the interrogatories as self-serving. It may be that an answer of a witness which serves to support his claim is self-serving but then all testimony in support of a litigant's position is self-serving in that sense. The objectionable features of what we ordinarily call inadmissible self-serving statements are usually objectionable for some other reason. Jones on Evidence, Fourth Edition, Section 235, discusses this type of evidence and points out that self-serving statements ordinarily do not have the sanction of an oath and then continues:

“The declarations of a party which are favorable to his interest are not admissible in his behalf. Manifestly it would be unsafe if, without restriction, parties to litigation were allowed to support their claims by proving their own statements made out of Court. Such a practice would be open not only to all the objections which exist against the admission of hearsay in general, but would also open the door to fraud and to the fabrication of testimony.

\* \* \* \* \*

It has been held, too, that there is no special rule excluding self-serving declarations merely because

they are of that character if they are not otherwise inadmissible as hearsay or for some other reason.”

The answers made by appellees to the interrogatories were required to be made upon oath under FRCP 33 and had appellees failed to answer, certain penalties could have been imposed, and had they failed to answer truthfully other and more severe penalties could have been imposed. The answers to the interrogatories were served on appellant on April 2, 1954, nine months before trial. Appellant had ample opportunity to verify the truth of the answers before trial, however, appellant failed to avail himself of this opportunity and at the trial of the case offered no evidence in rebuttal as to the existence of the property and in fact introduced no evidence at all as to the value of property destroyed even though this property was the sole basis of appellees' claim for damage.

Appellant's contention that FRCP 33 is for discovery only and does not contemplate the use of interrogatories or answers as evidence, a contention which it urged throughout the trial and now urges in this brief, is not supported by any case since Rule 33 was amended in 1948, and the rule itself is clear and indubitably allows the use of interrogatories and answers to the same extent as provided in FRCP 26(d)(2) for the use of a deposition of a party.

**SECOND ARGUMENT.****(Points Three and Four.)**

Appellant has joined points three and four together for its second argument and has divided point three into two parts, (a) and (b).

With reference to appellant's sub-point (a) appellees mention that there is no part of appellant's brief that treats the subject of "Erroneous conclusion as to proof of value" or that the judgment was "based upon the wrong measure of damages" and that the only reference in appellant's brief to either subject is in the statement of the point itself.

It would seem therefore that no response to (a) of point three would be required of appellees, nevertheless we point out that each of the appellees gave evidence as to the value of his property and the court based its judgment on that value after deducting 30% therefrom for depreciation upon hearing an insurance adjuster (R. 414) testify that in settling insurance claims on the loss of property, similar to the property lost by appellees, he would deduct from the purchase price value a figure somewhere between 20% and 33%. The appellant at no time during the trial called a witness or provided evidence as to proof of value or presented to the Court any suggestion or formula as to how to measure damages. The Court, based on the insurance adjuster's testimony, made a flat deduction of 30% from the values claimed by appellees.

Appellant in sub-point (b) under point three says: "That no cause of action in favor of these two particular plaintiffs, or any of the plaintiffs, was actually proven."

Appellees consider this equivalent to a challenge as to the sufficiency of the evidence to support the judgment in favor of the appellees.

Appellee Callaway personally, and Hobbs by deposition, testified as to all phases of appellee's case, including value of property and the loss of the same and each such appellee was cross examined in great detail by counsel on all phases of their testimony on direct examination, including description, price, place of purchase, and age of articles destroyed.

Appellees Weeks, Judson, Franz, Cullinane, and Mulcahy all testified personally as to all facts concerning their employment, their housing, the fire and the cause thereof, the Court admitted their answers to the interrogatories into evidence only as to proof of loss of property and the value of the same. Cross examination of these witness covered all phases of their direct examination.

Appellee Holbrook, unable to come to the trial from his home in Kentucky, proved his case by the admission into evidence of the interrogatories and answers as a deposition under FRCP 33 and 26(d)(2).

Appellees by that evidence have fully supported their claim for damages. Each one proved that he was an employee of the appellant and was an occupant of the housing unit furnished by the appellant pursuant to the written union-contractor agreement (R. 438, par. 6(a)); each proved directly or indirectly that the fire resulted from defendant's negligence; each appellee proved that he lost property in the amount found by the Court. The appellees, and each

of them, supported their causes of action for damages by a preponderance of the evidence.

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#### **FURTHER ARGUMENT.**

**(Points Three and Four.)**

While appellant states that it will argue points three and four together, it actually proceeds to ignore both points and commences its argument by quoting several pages of testimony commencing with page 24 of the brief pertaining to the use of oil and gasoline in the stoves. Appellant emphasizes this testimony by quoting part of it in italics apparently for the purpose of showing that the appellees did not know for whom the bull cook, who was mixing gasoline and oil, worked, and that appellees knew that use in a heating stove of fuel oil, to which had been added a quantity of gasoline, was dangerous and that regardless of this knowledge appellees continued to live in the barracks. Appellees find it difficult to understand how the quoted testimony is relevant to either point three, as subdivided (a and b), or point four. Appellant's original statement of points (R. 446) has assigned as error eight separate points. The sixth point refers to assumption of risk but appellant has not re-designated that point in its brief, nor has it grouped it with any other point for argument.

Appellant in quoting testimony, pages 24 to 30 of its brief, attempts to emphasize two propositions. First, that the bull cook, who was negligent, was not known by the witness to be an employee of appellant; and

second, that the appellees assumed the risk by continuing to live in the barracks.

Appellant does not mention that each appellee established that appellant furnished the living quarters and assigned appellees to the barracks building for that purpose and that appellant had a contractual obligation to furnish such quarters (R. 438).

Appellant also has carefully avoided in setting forth the testimony commencing at page 24 of the brief the further testimony of the appellee Franz to the effect that upon accidentally discovering that regular fuel oil was being mixed with gasoline, not only informed his job steward, but also personally informed one Jules Ferer, the project superintendent for Haskell Plumbing and Heating Company, that he had observed the practice and that he considered it dangerous. This testimony conspicuously omitted by appellant appears in the transcript of record at page 250, line 7, which we quote:

“Q. Did you call it to any one else’s attention?

A. Yes, I called it to the superintendent of Haskell Plumbing and Heating’s attention.

Q. Who was he?

A. Jules Ferer.

Q. Now, did you point out anything to him about that practice?

A. Well, I told him I couldn’t recommend that kind of practice.

Q. Now, don’t say what he said, but so far as you know, did they change their procedure?

A. I don’t believe so; I don’t know.

Q. Now, did you tell any one else besides Jules Ferer?

A. Yes, I told the shop steward.

Q. And who was the shop steward?

A. Michael Cullinane.

Q. Michael Cullinane. You know you told him? And do you recall telling anybody else?

A. Well, it caused quite a discussion, and I guess I told everybody.

Q. You recall talking it over with your fellow employees; is that correct?

A. Yes."

and again at page 262 there was further testimony which we quote:

"Q. Mr. Franz, in your conversation with the bull cook, after you called his attention, as you said, to the fact of this dangerous practice, did he satisfy you that it was not?

A. No.

Q. Did he make any statement to you that it was not dangerous?

A. They was working on a theory, to my way of understanding it, to see whether it would work.

Q. Who was working that out?

A. I don't know who he worked for. If he was working for Haskell or Gaasland. I don't know who he was working for. I don't know.

Q. Did you have enough conversation with him to ascertain whether he was doing it on his own volition or under ——?

A. No. It was my understanding he had been told to do that.

Q. And you gleaned that from your conversation?

A. Yes.

Q. And when you talked to the superintendent, did the superintendent satisfy your fears about it?



A. He said he would see what he could do about it.

Q. And on that assurance you went back and stayed in the barracks?

A. That's right."

Appellant has also failed to mention in its brief the testimony of Mike Cullinane, the job steward, on this subject, which we quote (R. 271, 272):

"Q. Now you heard Mr. Franz testify yesterday that he mentioned to you that the bull cook was mixing gasoline and diesel oil and putting it into barrels to be used as fuel for the stoves. Did you hear him so testify?

A. Yes, I did.

Q. And did he mention that fact to you?

A. Yes, he did.

Q. Did you mention that to anyone else?

A. Yes, as job steward I mentioned it to Mr. Jules Ferer who was the superintendent for Haskell Plumbing and Heating, to see if he would do anything about it, inasmuch as we didn't think it was a safe practice; and he said that he would take care of it.

Q. I think that perhaps you ought not to say what he said. It is hearsay; but were you satisfied that something would be done about it?

A. Yes, I was satisfied with the answers that Mr. Ferer give us on that, inasmuch as we never had any occasion to doubt his word; he had been very pleasant and easy to get along with, as the superintendent on the job and all.

\* \* \* \* \*

Q. When you told him that the—that you had heard from Mr. Franz that the bull cook was mixing gasoline and diesel oil to create a fuel for the

stoves—when you told him that, what did he say to you?

A. Well, he said that he knew about the incident, that Mr. Franz had mentioned it to him, and perhaps it wasn't safe and he would take measures to have it taken care of so that they wouldn't do that any more."

And again on cross examination (R. 278) the appellee Cullinane testifies as follows:

"Q. Now, when you mentioned this bull cook having been seen mixing gasoline and the oil, did you mention that to Jules somebody, did you say?

A. I didn't mention the bull cook and the oil to Mr. Jules Ferer as having seen it. I mentioned that Mr. Franz had seen this bull cook mixing this oil and gasoline, and reported the incident to Jules to have him do something about it.

Q. Now he was in what capacity there?

A. Why he was the head man—the superintendent—for Haskell Plumbing and Heating.

Q. Well did he have anything to do with anything but the plumbing?

A. I wouldn't know. That's the capacity we were in—plumbers and fitters, and what else, I do not know.

Q. Well he was the superintendent on the works, was he not?

A. I don't know. He was the superintendent on the plumbing and heating.

Q. Well, he was general superintendent over everything there, was he not?

A. No, he wasn't.

Q. Who was the general superintendent, then?

A. As far as I know, the general superintendent of Gaasland Construction Company was a gentleman that died a year or so after that.

Q. Do you remember his name?

A. I recall his first name and I believe it was "Pete". And may have been Jensen, but I am not sure of that.

Q. All right. Now was—you didn't mention this to Jensen, did you?

A. We don't have anything to do with those people I mean we are—

Q. But did you?

A. No.

Q. Un-huh. Now, about what date was it that you mentioned this to this fellow 'Jules'?

A. It was right after Mr. Franz reported it, which was around the first of October, as I recall.

Q. Did you ever mention it to him any more after that?

A. No, this Mr. Ferer was a very competent man, to say the least, and when he'd say he'd take care of something, why that was all there was to it."

Appellant's witness, F. Murray Haskell, in reply to the following questions (Sup. R. 467) gave the following answers:

"Q. Was your superintendent the man who is directly over the plaintiffs in this action?

A. That's right.

Q. And he would see the men there in the barracks probably every day?

A. He lived in the quarters right next to the mess hall also. How many times he was at the barracks that burnt, I have no knowledge."

Appellees were three hundred miles from Anchorage, performing seasonal work in a construction camp and were compelled to live under such conditions and circumstances and at such a place as the appellant designated (Sup. R. 457). Appellant infers that if they didn't like the kind of fuel being used to heat the barracks they should not have continued to live there. The fact of the matter is they were required to live where they were assigned and had no choice in the matter (Sup. R. 457) and Haskell himself admits (Sup. R. 471) that there was no other place for them to live.

---

#### FURTHER ARGUMENT ON POINT FOUR.

Haskell Plumbing and Heating Company could not delegate its contractual obligation to furnish living quarters to plaintiffs by making arrangements with another company to maintain the barracks.

Appellant's point number four presumably is directed at some error which appellant believes the Court committed, however, it is difficult to pin point the error claimed. A careful reading of the point seems to indicate that inasmuch as the defendant claims it was not responsible for furnishing living quarters to the plaintiffs, and that any act of negligence which caused the fire was the negligence of a bull cook who was employed by Gaasland Construction Company that defendant was therefore not liable for loss of plaintiffs' property.

This position of non-liability, taken by the appellant, is in our opinion untenable. It assumes that one party to a contract who is obligated by such contract

to perform a duty to the other party may escape responsibility for failure in performance by delegating the duty to a third party without the knowledge or consent of the party to whom the duty is owed.

An examination of the interrogatories filed by each plaintiff, and in the personal testimony of each, will show that the plaintiffs believed *defendant was furnishing* the room and board and knew nothing about defendant's arrangement with Gaasland.

It is perfectly clear that under the terms of the contract (R. 438) paragraph 6 (a) that the defendant had a duty to furnish living quarters to plaintiffs. Appellant contended throughout the trial and presently in its brief that defendant was not a party to this contract and therefore was not bound by it. This contention, however, is without merit because appellant may not avoid the plain obligations of the contract (R. 426) or the consequences of the testimony of its own witness, F. Murray Haskell, principal officer for the defendant, Haskell Plumbing and Heating Company, who was questioned and answered as follows (Sup. R. 463):

“Q. Under the terms of your contract with the representative union at Anchorage in connection with the hiring of the plaintiffs in this case, at King Salmon, you were aware and conscious of the obligation of the Haskell Plumbing and Heating Company to furnish these men, your employees, with housing facilities and with their meals during the time they were performing their contract with your company?

A. That is correct.

Q. And you folks, meaning the Haskell Plumbing and Heating Company, undertook to do that?

A. That's right."

Appellant in support of this contention has relied chiefly on the fact that the barracks building was not owned by defendant but by Gaasland Construction Company and that the person who had mixed gasoline with fuel oil was an employee of Gaasland Construction Company. It does not seem to us that defendant could escape liability for the loss of the plaintiffs' property because he had some private arrangement with Gaasland Company to use Gaasland's building to house defendant's employees, or that an employee of Gaasland's, rather than an employee of defendant, filled the fuel barrels and was guilty of the specific act of negligence that occasioned the explosion and fire. Defendant had a duty to furnish satisfactory housing for the plaintiffs, and by satisfactory housing it surely meant a duty to furnish safe housing, and if in order to discharge this duty, defendant provided a building owned by some other contractor, and arranged for an employee of the other contractor to fill the fuel barrels, it could not take the position that it was not liable for the consequences of the negligent act of this other employee and insist that plaintiffs should have filed suit against the other company. Appellant's brief in the concluding paragraph states "Surely the plaintiffs have sued the wrong corporation as defendant."

The trial court in its opinion (R. 423) said:

"Then we come to the question of who is responsible for that damage. Other things being

equal there would be no argument, of course, but what the employer who agreed to furnish the quarters would be so liable. The defendant claims in his deposition that it is not liable because it, the corporation employed—not employed but made an arrangement with the general contractors—the Gaasland Company—to take care of all of this board and room which they are obligated to furnish. It seems that they had a cost-plus contract, and that all of their costs were to be paid by Gaasland, and therefore Gaasland, who was maintaining a camp, agreed to provide these accommodations. Now, it is argued that that entirely relieves the employer from this responsibility—but I fully concur with the position taken by counsel for the plaintiffs that under the law such responsibility cannot be so delegated; that this is the type of liability which an employer or anyone else cannot relieve himself by simply passing it on to someone else. And in fact, if you please, that the superintendent of Haskell Plumbing Company, Mr. Ferer,—if it be true that he did report it to Gaasland, it makes the situation worse and not better, because again they are trying to escape responsibility, and to use the common phrase ‘pass the buck’, but that is not permissible under the law. *I agree with counsel that no suit could be maintained against Gaasland Construction Company for these damages.* The doctrine that such responsibility cannot be so delegated is set forth in a great many authorities, most of which have been cited by counsel, together with the case which I mentioned. The liability springs from the wrong, and that is the fundamental question here. The wrong in this case may not be one of commission—it may be said that Has-

kell Company and its employees did not put this gas in the oil—but it is one of omission. It was the duty of the Haskell Company to see that these premises were safe, and when informed of a dangerous situation to see that that situation was immediately corrected, which obviously was not done. Therefore, I find that the defendant is liable for this damage. Whether they may have recourse against the Gaasland Construction Company is not for me to determine, but possibly they have.” (Emphasis ours.)

We think the Court came to the correct conclusion and the authorities support that conclusion squarely. Williston on Contracts, Rev. Ed., Vol. Two, Section 411 reads:

“The duties under a contract are not assignable inter vivos in a true sense under any circumstances; that is, one who owes money or is bound to any performance whatever, cannot by any act of his own, or by any act in agreement with any other person, except his creditor, divest himself of the duty and substitute the duty of another.  
\* \* \* One who is subject to a duty though he cannot escape his obligation may delegate performance of it provided the duty does not require personal performance. In the absence of express agreement to the contrary there will be no such requirement if the duty is of such character that performance by an agent will be substantially the same thing as performance by the obligor himself. The performance in such a case is indeed in legal contemplation rendered by the original obligor, who is still the party liable if the performance is in any respect incorrect.”



35 Am. Jur. 533 (Master and Servant) states the general rule as follows:

“If the contract of employment contemplates provision by the employer for food, clothing, and shelter for the employee, any neglect of obligations thus assumed will render the employer liable for injuries sustained by the employer, or if the employer undertakes to provide for the employee he will be liable if he furnishes an unsuitable lodging place.”

The employer owes a duty to his employees to provide for them a safe place to work and if circumstances require that the employees live upon the employer's premises while performing that work then the duty extends to providing a safe place for the employee to live, particularly when the compensation provided in the contract of employment includes board and room. This duty, including the providing of safe instrumentalities, equipment and tools for the protection of the employees, also extends to such instrumentalities as heating stoves for the employees' quarters. The rule requiring the maintenance and repair of instrumentalities at the location of the employment is stated in 35 Am. Jur. 570, and requires not only the maintenance and repair of instrumentalities but states that the employer is bound to maintain these instrumentalities in a safe condition.

This duty of the employer to maintain a safe place for his employees “is affirmative and continuing, and it cannot be delegated to another so as to relieve the employer of liability in case of non-performance.” 35 Am. Jur. 612.

We find the following rule which seems to compare rather closely with the subject case:

“If the contract of employment contemplates that the employee shall sleep upon the premises of the employer, the latter is bound to exercise care to see that the sleeping quarters are safe, according to the standard of care to which the employer is obliged to conform.” 35 Am. Jur. 599.

The testimony of both defendant's witnesses, Blair and Haskell, will show that the arrangement under which Gaasland Construction Company furnished a barracks building to defendant, in which to house defendant's employees and to provide caretaker service for said building, was one of convenience and accommodation for both the defendant and the general contractor, Gaasland. Blair put the whole situation in one answer (R. 393) when he said:

“Q. What was the arrangement?

A. As I recall, one of the provisions of the agreement with Haskell Plumbing & Heating Company was that they should be compensated for all of their costs in connection with their subcontract, and that they should receive a certain additional amount over and above the costs. There was, therefore, no object in Gaasland Company's billing subsistence and quarters to Haskell only to have Haskell bill them back to Gaasland Company. That, to the best of my recollection, explains the absence of any agreement as to a specific amount to be charged.

Q. Gaasland just picked up the check as it came along?

A. That is correct.”

Thus we find that Gaasland as prime contractor and Haskell as subcontractor had a "cost plus a fixed fee contract" under the terms of which Gaasland was to pay all Haskell's costs. Part of Haskell's costs would have been housing and feeding of its employees. In order to avoid duplication or double bookkeeping Gaasland simply assumed the cost directly. This arrangement did not place Gaasland in the position of independent contractor, and nowhere in appellant's brief does it contend that Gaasland was an independent contractor. We are of the opinion, in view of the authorities cited, that the duty of the defendant to furnish safe quarters to the plaintiffs, was of an affirmative and continuing nature and could not be delegated to another, even an independent contractor, to relieve the defendant of liability.

We find this rule especially applicable in this case:

"Likewise, one who, by a specific agreement, undertakes to do some particular thing, or to do it in a certain manner, cannot by employing an independent contractor, avoid responsibility for an injury resulting from the nonperformance of any duty or duties which under the express terms of the agreement or by implication of law, are assumed by the undertaker." 27 Am. Jur. 526.

The above rule was stated in the case of *Atlanta & F. R. Co. v. Kimberly*, 13 SE 277, 27 Am. St. Rep. 231.

## ARGUMENT.

(Contributory Negligence—Assumption of Risk.)

Appellant contends that because appellees continued to live in the barracks after learning that an unsafe fuel was being used in the stove were negligent themselves and assumed any risk involved. Appellant says at page 35 of its brief:

“B. The plaintiffs testified of the knowledge of the danger of mixing gasoline with stove oil; testified of reporting this matter to at least a part of the other plaintiffs herein and admitted going on living in the premises knowing explicitly the danger involved and, therefore, assumed the risk.”

and again on page 36, appellant says:

“C. The testimony above quoted shows that the plaintiffs well knew of the dangers in living in the Quonset hut, after seeing and knowing of the mixing of the oil and gasoline, and their action in *continuing to live there and making no effort to correct the conditions known by them to be dangerous*, made them guilty of contributory negligence, \* \* \*” (emphasis ours).

and again on page 38 appellant says:

“We think that the question of contributory negligence is elementary in this case, because there is no evidence to indicate that the defendant knew or had any reason to know or believe that gasoline was being mixed with the oil used in the Quonset hut where the plaintiffs were sleeping, \* \* \*”

It is difficult for us to understand how appellant can seriously suggest the foregoing propositions, when

it is clear in the record that at least two of the plaintiffs, following a discussion amongst all the plaintiffs (R. 250), went to defendant's superintendent and called to his attention the use of gasoline treated fuel oil (R. 250, 271, 272) and were assured by the superintendent that the use of such fuel oil would be discontinued (R. 263, 273) and based on this assurance they continued to live in the barracks (R. 263, 272, 279).

Appellant says plaintiffs' action in continuing to live there and making *no effort to correct the condition* known to them to be dangerous, made them guilty of contributory negligence. Appellant obviously did not read the recorded testimony on the subject in full. Appellant says there is nothing in the evidence to indicate that the defendant knew or had any reason to know or believe that gasoline was being mixed with oil. Appellant's witness, F. Murray Haskell, testifying for the defendant, said that he had a superintendent on the project who was his agent (Sup. R. 264); he also said that his superintendent was directly over the plaintiffs (Sup. R. 467). It would appear to us in view of the fact that both appellees Franz and Cullinane, having informed defendant's superintendent of the gasoline treated oil and Haskell's admission that he had a superintendent on the project and that the superintendent was his agent, that appellant's claim that it knew nothing about the matter is unworthy of belief.

These facts and the following authority should successfully dispose of this contention in favor of appellees.

“According to a well-settled general rule, the ‘assumption of risk’ or responsibility which is based upon the employee’s knowledge that a tool, instrument, appliance, piece of machinery, or place of work is defective or dangerous is suspended by the employer’s promise to repair, made in response to the employee’s complaint, so that, if the employee has been induced by the promise to continue at work, he may recover for an injury which he has sustained by reason of the defect within a reasonable time after the making of the promise. \* \* \*” 35 Am. Jur. 743, *Seaboard Air Line R. Co. v. Horton*, 239 U.S. 595.

It is our opinion that “contributory negligence” and “assumption of risk” are affirmative defenses which must be pleaded if a party expects to rely on such a defense. Appellant not only did not raise the defense in its pleadings, but did not raise it during the trial and has not argued it in the brief under the color of a designated point, and has only discussed it in its brief, to use appellant’s words “solely as a precautionary measure in case the court should overrule appellant’s other arguments.”

Appellees were not guilty of contributory negligence nor did they assume any risk and appellant cannot raise such an issue on this appeal.

**FURTHER ARGUMENT.****(Negligence of Defendant.)**

Defendant was negligent in permitting the barracks to be heated by using gasoline treated fuel oil.

We have previously shown that defendant had an affirmative and continuing duty to safeguard plaintiffs and may not escape liability by delegating that duty to another. We think that the failure of defendant to discontinue the use of gasoline treated fuel oil when the danger incident to its use was called specifically to its attention was negligence and appellees' loss resulted from that negligence.

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**CONCLUSION.**

We conclude by stating that the appellees have shown that the trial Court, in admitting into evidence the interrogatories and answers, did so in accordance with provisions of FRCP 33 and 26 (d) (2); that the defendant, Haskell Plumbing and Heating Company, could not transfer liability for the loss of plaintiffs' property to a third party by making an arrangement with that third party to perform a duty which defendant had obligated itself to perform under the contract of employment; that the defendant was negligent in knowingly permitting to be used a dangerous fuel for heating the building in which plaintiffs were housed; that plaintiffs did not assume the risk of living in the building furnished by defendant under the terms of the contract, and that they were not guilty of contributory negligence; that the Court placed a

fair value on the articles of personal property lost by the plaintiffs in the fire; and for the foregoing reasons the judgment of the trial court should be affirmed.

Dated, Anchorage, Alaska,  
January 5, 1956.

Respectfully submitted,

HAROLD J. BUTCHER,

*Attorney for Appellees.*



No. 14,724

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

HASKELL PLUMBING AND HEATING COMPANY, INC., a corporation authorized under the laws of the State of Washington and doing business in the Territory of Alaska,

*Appellant,*

vs.

JIMMY WEEKS, TOMMY JUDSON, MIKE CULLINANE, OLE FRANZ, ROY CALLAWAY, TOM MULCAHY, BEN HOLBROOK and JESSE HOBBS,

*Appellees.*

**On Appeal from the District Court for the  
Territory of Alaska, Third Division.**

**REPLY BRIEF OF APPELLANT.**

---

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CHAPTER IV. THE GREAT FESTIVAL  
OF THE SPRING

No. 14,724

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*Appellees.*

**On Appeal from the District Court for the  
Territory of Alaska, Third Division.**

**REPLY BRIEF OF APPELLANT.**

---

**REPLY STATEMENT OF FACTS.**

Appellant for reply to appellees' brief must correct what appellant contends to be an erroneous statement. On page 2 of appellees' brief it is stated that "an explosion resulted *from defendant's negligence*".

There is no evidence in the record anywhere that the defendant or any agent, servant, or employee of its, committed an act of negligence. There is some testimony that the "Bull Cook" who unquestionably was an employee of another corporation and not an employee, agent or servant of the Haskell Plumbing & Heating Company, put some gasoline in a quantity of oil. But, that particular employee was an employee of the general contractor, Gaasland Construction Company. (Tr. 466-467.)

Counsel for appellee stated in his brief at page 6 that "defendant objected on the grounds that the answers to interrogatories were not admissible in evidence but were limited to Rule 33 to discovery only", but, did not mention in their brief that defendants objected further, "that they were *incompetent, irrelevant and immaterial*"; "*that they did not meet the rules of evidence*" (Tr. 203, 204 and 205); when the record shows that each of the witnesses were put on the stand and certain questions asked them and then the interrogatories having previously been answered by them were introduced as a part of the witnesses' evidence and *defendant was not permitted to cross-examine the witness on anything in the interrogatories which was the sole evidence of the damages suffered and the value of the property lost*. As noted in our original brief, this applies to many of the plaintiffs and we contend that no evidence of any property loss or the value thereof was ever proved by any competent evidence, since the only evidence offered by these particular plaintiffs was the interrogatories and

answer filed in the discovery effort and no portion of these interrogatories were admissible in evidence and their admission was objected to and therefore no competent evidence as to damage suffered or property lost was ever introduced.

Counsel for appellees take a very broad exception to our statement to the effect that the contract introduced, did not contain in the body thereof anywhere, the name of the defendant in this action, and accused counsel of mis-stating facts. We call your attention to this exhibit commencing on page 426 Tr. and again we call your attention to the fact that this is a contract entered into "between the *Plumbing, Heating & Pipe Employers of Anchorage, Alaska* and Local No. 367 of the United Association of Journeymen and Apprentices of the plumbing and pipe fitting industries of the United States and Canada." Now, we again call to your attention that Haskell Plumbing & Heating Company, Inc., a corporation's name is not mentioned in the contract *anywhere*. But, at the base of it, there is signed to it *F. M. Haskell Plumbing & Heating Company, Inc.* Whether or not *F. M. Haskell Plumbing & Heating Company, Inc.*, is the same corporation as Haskell Plumbing & Heating Corporation, no one has explained in the record and there is no evidence to that effect. There is nothing in the contract other than the signature of F. M. Haskell to bind the Haskell Plumbing & Heating Company in any way and neither *F. M. Haskell Plumbing & Heating Company, Inc.* nor Haskell Plumbing & Heating Company, Inc. are mentioned in the body of

the contract and that is exactly what we called your attention to in our statement set forth in the brief.

On page 8 of appellees' brief you will find the statement that "prime contractor, Gaasland, was required to pay defendant for its work on the heating and plumbing; it showed that defendant had an obligation to pay Gaasland for housing and feeding its employees". This, of course, is correct. Then, the statement as follows: It showed that defendant and Gaasland worked out a private arrangement by which Gaasland would turn over to defendant's a barracks building in which to house defendant's employees and provide a man, "Bull Cook", to be caretaker of the premises and in addition would provide meals for the defendant's employees. There is not a scintilla of testimony that the "Bull Cook" was an employee in any way of Haskell Plumbing & Heating Company, Inc. and on the contrary, he was an employee of Gaasland and the defendant paid Gaasland for feeding and housing its employees and Gaasland became an independent contractor for the purpose of feeding and housing all subcontractor's employees (Tr. 397-398)—"Gaasland furnished all the personnel to take care of it—eating, housing." (Tr. 398.)

We specifically call your attention to the true facts as set out in this contract (Tr. 6 (a) page 438) "member sent out of town by the employers *shall be furnished* first class board, room and transportation and straight-time wages, etc." The very contract implies that the employer shall pay for the board, room and transportation. It does not even indicate that the



board, room and transportation is to be personally performed by the appellant corporation and, the evidence shows conclusively in this case that if there was any negligence, then the negligence was that of the "Bull Cook" of the Gaasland Construction Company and not an employee, agent or servant of the Haskell Plumbing & Heating Company, Inc. The balance of the statement of facts of appellees is purely argumentive.

We have never felt that any of our cases were so weak that we needed to resort to abuse of opposing counsel. Even if we have often found where counsel was mistaken some in over-stating their position in the arguments in their brief. But, since appellants have spent a good portion of their time in the brief insinuating dishonesty on the part of appellant's counsel, it will be necessary for us to call your attention to some of the things that need explaining to you. In the first place, our brief was written from the transcript printed in this case September 21, 1955. Our brief printed and filed in compliance with our letter to Pernau-Walsh Printing Company dated November 23, 1955 and after our brief was served on the appellees there was a supplemental transcript printed December 23, 1955, which contains most of the testimony complained of by appellees. (See page 10 of their brief.) It will show that the last page of the original transcript is 449 and the supplemental transcript starts with page 451 and continues to 472 and the portion appellants quote in their brief of the testimony of F. Murray Haskell was not in the

original transcript, but was in the supplemental transcript prepared by appellees after our brief was prepared, served and filed. All of this information is and has been in the hands of the appellees and must have been known by them when their brief was being prepared.

The contract that we so earnestly objected to its admission is found in the original transcript page 426 and we certainly did object to its introduction because the contract itself shows that it is between the Plumbing, Heating & Pipe *Employers of Anchorage*, Alaska, and Local 367 of the United Association of Journeymen and Apprentices of the plumbing and pipe fitting industry of the United States and Canada. Haskell Plumbing & Heating Company is not an Alaskan Company at all, but is a Washington corporation with its principal place of business in that state. (See plaintiff's complaint.) We have heretofore called your attention to the fact that this contract was signed F. M. Haskell Plumbing & Heating Company, Inc., a legal assumption could very easily arise that *F. M. Haskell Plumbing & Heating Company*, could be a separate corporation from *Haskell Plumbing & Heating Company* and the address on the bottom of the contract on page 443 that was written there by F. M. Haskell is 1509 Cornwall Avenue, Bellingham, Washington.

However, whether or not the written contract was entered into between the appellant and the appellees, its name is not mentioned in the body of the contract and is very immaterial and should in no way affect

this law suit. Our statement was merely to outline the issues as we saw them.

The questions raised in this appeal have little to do with the terms of that contract, but I wish to call your attention to the fact that on page 438 Tr. the sixth paragraph of this contract states: Members sent out of town by the employers *shall be furnished* first class board, room and transportation." It shows clearly that this is to be furnished to them and the very fact that Haskell Plumbing & Heating Company paid for the board and lodging of its employees to Gaasland Construction Company, whom the record shows furnished all subcontractors' employees with board and room for a set price per man day does not come within the nondelegable duty, that counsel for appellees contend for.

Haskell Plumbing & Heating Company are plumbing contractors and everyone knows, are not engaged in the business of boarding and rooming people. But, the word "furnished" as used in this contract as defined by Black's Law Dictionary is: *To supply; provide, provide for use, whether gratuitously or otherwise*, and simply meant to arrange for it and to pay the bill and that is all that was done in this case and does not come within the nondelegable duty of personnel services of a highly technical character.

The independent contractor insofar as the food and lodging is concerned was Gaasland Construction Company, whom the evidence shows furnished Quonset huts, for the various contractors, had a large eating establishment, where all employees of the various sub-

contractors ate their meals, and the testimony shows clearly that Gaasland Construction Company furnished the Quonset huts, the food *and all of the personnel to operate this service* and the undisputed evidence found in the supplemental transcript on pages 457, 458 and 459, a part of which is as follows:

“Q. Who requested this Quonset hut or barracks which the plaintiffs occupied there at King Salmon after leaving the Sky Motel; who directed or requested the construction or preparation of those facilities for these men who worked for you?

A. *Gaasland Construction Company.*

Q. Did Haskell Plumbing & Heating Company make any request or have any agreement with the Gaasland Construction Company for the construction or preparation of those facilities for your men?

A. *We were asked to submit the number of men that we would have, to Gaasland so they could prepare to house the total number, that would be required for all the different subcontractors on the job.*

Q. Then is it your testimony that the Gaasland Construction Company was the owner of this Quonset hut or barracks which burned on October 11th, 1951?

A. That is correct.

Q. And the Haskell Plumbing & Heating Company had an agreement with the Gaasland Construction Company—

Mr. Gemmill. Wait until I finish.

Q. (Continuing). —whereby the Gaasland Construction (15) Company furnished these facilities for your men?

A. Yes; at a going rate.

Q. And did you have a written agreement or contract with Gaasland Construction Company?

A. In regard to housing and that?

Q. In regard to housing your employees up there?

A. No, Sir, no more than I would have with Universal Foods in Fairbanks or Anchorage where the same type of housing is available."

The learned trial judge in our opinion became confused on the law in this case and there is a *difference* in the applicable law where the contractor was actually preparing and serving the food and served something that caused sickness of the employee, and the case at bar. The word furnishing as used in the contract was complied with by paying for the food and lodging *acceptable to the employees*, which was furnished by the general contractor, Gaasland Construction Company. We contend that the fire, which destroyed the plaintiff's property, must have its origin by the negligence of the defendant below, before a cause of action exists against it. In other words, the plaintiff's case here must as a matter of law, be based upon negligence of the employer, and not the negligence of someone else as is the case here. Assuming that one of the plaintiffs did observe the mixing of gasoline with the stove oil by the "Bull Cook", he must have known that the "Bull Cook" being an employee of Gaasland Construction Company, the principal contractor on the job, and the subcontractor furnishing the food and lodging for all of the subcon-

tractors' men, that the negligence, if any, was the negligence of employees of Gaasland Construction Company, and not the negligence of the defendant. This was argued to the trial court at all points of the case. But, the trial court took the position that there was a non-delegable duty of the defendant *to protect the property of the employees* and upon this theory he rendered judgment in favor of the Plaintiffs.

Now, there positively is no non-delegable duty in this case and the plaintiff has furnished us no authority for so holding. He has cited a portion of a paragraph of the 35th Am. Jur. and to read the entire paragraph 105, of 35 Am. Jur. on page 533, we find a different rule from that contended for by appellees, except the last paragraph and that paragraph is based upon *Griffith v. Cole Brothers*, 165 Northwestern 577, and an analysis of the case does not justify the statement quoted from it in Am. Jur. This statement in Am. Jur. must have been taken from the District Court decision, which was later reversed on appeal.

This was a Workman's Compensation case based upon a death having taken place in a tent furnished by the employer, the husband of the claimant having been killed by lightning, and went off on the theory as set out in Syl. 8 as follows:

“8. Master and Servant 403—Workmen's Compensation Act—‘Arising out of Employment.’

A bridge builder having finished work for the day, when struck by lightning while sitting in the boarding tent furnished by the employer, did not receive an injury arising out of his employment.”

But, this is not in point with the case at bar, because the case at bar is not a workman's compensation case, but is an action based solely upon negligence. We do contend that the case is very material however, because the quotation cited by appellees as 35 Am. Jur. 533 is based on this case evidently before it was reversed by the Supreme Court of Iowa.

Counsel for appellees contend on page 14 of their brief that the defendant's answer did not plead contributory negligence or assumption of risk; this is true, but the case was tried on that theory without objections and the answer will be considered as amended under Rule 15 subparagraph (b).

We call to your attention that if the interrogatories were properly admitted, which we strenuously contend that they were not, then there is no competent evidence even in the interrogatories and answers upon which a judgment for any amount could be based, as there is not even an attempt to fix the damage suffered by the individual plaintiffs and nothing upon which the court could base a judgment. There is not even evidence of value of the articles lost, if any.

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**SPECIFIC REFERENCE AND REPLY TO FIRST ARGUMENT  
IN APPELLEES' BRIEF AT PAGE 14.**

We must call your attention to the fact that no new citations were furnished by appellees' brief. However, we appreciate the opinion of the attorney stated therein but we do not feel that it is as persuasive as the many citations of authorities that are before this

Honorable Court. But, we confess that we overlooked a very important case in writing the appellant's brief. It is *Arnstein v. Porter*, 154 Fed. 2d 464, and, in the body of the opinion on page 470 there is a very intellectual resume of conditions that should assist this Honorable Court in analyzing the question herein involved, and specifically answers the argument of appellees' attorney in his brief. This statement taken from page 470 is as follows:

"To be sure, plaintiff examined defendant on deposition. But the right to use depositions for discovery, or for limited purposes at a trial, of course *does not mean that they are to supplant the right to call and examine the adverse party, if he is available, before the jury.* For the demeanor of witnesses is recognized as a highly useful, even if not an infallible, method of ascertaining the truth and accuracy of their narratives. As we have said, 'a deposition has always been, and still is, treated as a substitute, a second-best, *not to be used when the original is at hand*' for it deprives 'of the advantage of having the witness before the jury.' It has been said that as 'the appearance and manner of the witness' is often 'a complete antidote' to what he testifies, 'we cannot very well overestimate the importance of having the witness examined and cross-examined in presence of the court and jury.' Judge Lumpkin remarked that 'the oral testimony of the witness, in the presence of the Court and Jury, is much better evidence than his deposition can be \* \* \* Coxe, J., noted that 'a witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impres-



sion.' As a deposition 'cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration,' it 'is \* \* \* or it may be, the dead body of the evidence, without its spirit \* \* \*' 'It is sometimes difficult and impossible to get so full, explicit, and perspicuous a statement of facts from the witness through a deposition as it is by his examination before court and jury.' 'The right of a party, therefore, to have a witness subjected to the personal view of the jury, is a valuable right, of which he should not be deprived \* \* \* except by necessity. And that necessity ceases whenever the witness is within the power of the court, and may be produced upon the trial.''' (Emphasis ours.)

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#### REPLY TO SECOND ARGUMENT OF APPELLEES.

We still have the benefit of no citation by appellees, but simply the argument of counsel for the appellees. Our reply is that we rely upon the citations in the original brief and call to your attention that there is positively no testimony of negligence of the defendant in the court below, appellant here, and the judgment should be reversed, with instructions to the lower court to sustain appellant's (defendant below) motion to deny plaintiffs any recovery at all and to dismiss plaintiffs' complaint.

Counsel for appellees in their brief at page 28, under the title of Further Argument on Point 4 have cited an authority, Williston on Contracts, Revised Ed., Volume 2, Section 411. The reading of this sec-

tion shows its inapplicability to the question involved in this appeal and the next citation 35 Am. Jur. 533 has been previously handled in this reply brief and 35 Am. Jur. 570, of course, does not touch the question here and affects an altogether different situation. It affects the repair of the instruments used by his employees doing their job.

Appellees also refer to 35 Am. Jur. 612. In studying the wording we cannot find in this quotation the words "*to maintain a safe place for his employees*" as the actual reading of this citation is:

"This duty of the employer is affirmative and continuing and it cannot be delegated to another so as to relieve the employer of liability in case of non-performance."

and does not contain the words "to maintain a safe place for his employees" and, by adding those words you will note, the entire utterance or quotation is changed.

This of course could be an innocent mistake of counsel, and it must have been, but by including in this quotation the words that are not there, and if read as stated in the brief, the statement of law is completely changed. Commencing in the 6th line of paragraph 183 on page 610 of 35 Am. Jur. and reading down to the bottom of the paragraph on page 612 we find the following:

"Unless, however, the failure to furnish a reasonably safe place to work is the proximate cause of the employee's injuries, the latter cannot recover on that ground. In this respect, as in others,

the employer is not liable as an insurer; the measure of his obligation is the exercise of ordinary or reasonable care, the standard being the care exercised by prudent employers in similar circumstances, and the degree depending upon the dangers attending the employment.

This duty of the employer is affirmative and continuing, and it cannot be delegated to another so as to relieve the employer of liability in case of non-performance.

The question whether in any particular case the employer has discharged his duty in this respect is ordinarily one for the jury's determination."

It should be noted that the words "to maintain a safe place for his employees" as quoted in the last paragraph on page 33 of appellees' brief, are erroneously quoted, and are not there.

On page 34 of appellees' brief a quotation from 35 Am. Jur. page 579 is found. This quotation does not apply to the case at bar, in our opinion, because the employees were not sleeping on the grounds where they were working, but more than a quarter of a mile therefrom as shown in the evidence and in a Quonset hut furnished by the general contractor, Gaasland Construction Company.

We find another quotation on page 35 from 27 Am. Jur. 526. This quotation is based upon *Atlanta & F. R. Co. v. Kimberly*, 13 Southeast 277, from the Supreme Court of Georgia and to analyze the case you find it does not support the quotation. We quote from page 277 of the opinion as follows:

“The main question argued before us was whether under the facts of this case the railroad company was liable for the damages sustained by Kimberly. The general rule of law upon this subject is: Where an individual or corporation contracts with another individual or corporation exercising an independent employment for the latter to do a work not in itself unlawful or attended with danger to others, such work to be done according to the contractor’s own methods, and not subject to the employer’s control or orders except as to the results to be obtained, the employer is not liable for the wrongful or negligent acts of the contractor or of the contractor’s servants.”

This case supports our contention instead of the contention of appellees.

The next argument, page 36, has been covered previously. Then, on page 38 the citation quoted from 35 Am. Jur. 743 is certainly not in point at all as it affects a situation altogether different from the one before the Court. But, if you read on down after omitting approximately three lines, you find these words:

“\* \* \* if the defect is not remedied within the promised time, his further continuance in the service is at his own risk, and he is guilty of contributory negligence.”

---

#### CONCLUSION.

We wish to state in conclusion that none of the plaintiffs have made a case against the defendant

Haskell Plumbing & Heating Company and appellees' brief has failed to show any reason to the contrary, there being no evidence of any negligence on the part of the defendant in the court below, appellant here; for the further reason that there was no evidence of damages suffered or loss sustained by any of the defendants except Roy Callaway and Jesse Hobbs. The trial Court erred in permitting the introduction of the interrogatories with the answers by the respective plaintiffs, even though the plaintiffs were present and took the stand and testified to a part of their case and the defendant was prohibited from cross-examining the plaintiffs on the answers included in the interrogatories. The admission of these interrogatories in evidence was, in our humble opinion, a very prejudicial error which prevented the defendant from having a fair trial; this lack of evidence as to proof of loss of property or damage suffered, should have been taken into consideration, in connection with the defendant's separate motions to dismiss, as to each of the plaintiffs, for lack of evidence. These motions should have been sustained and an order of dismissal entered.

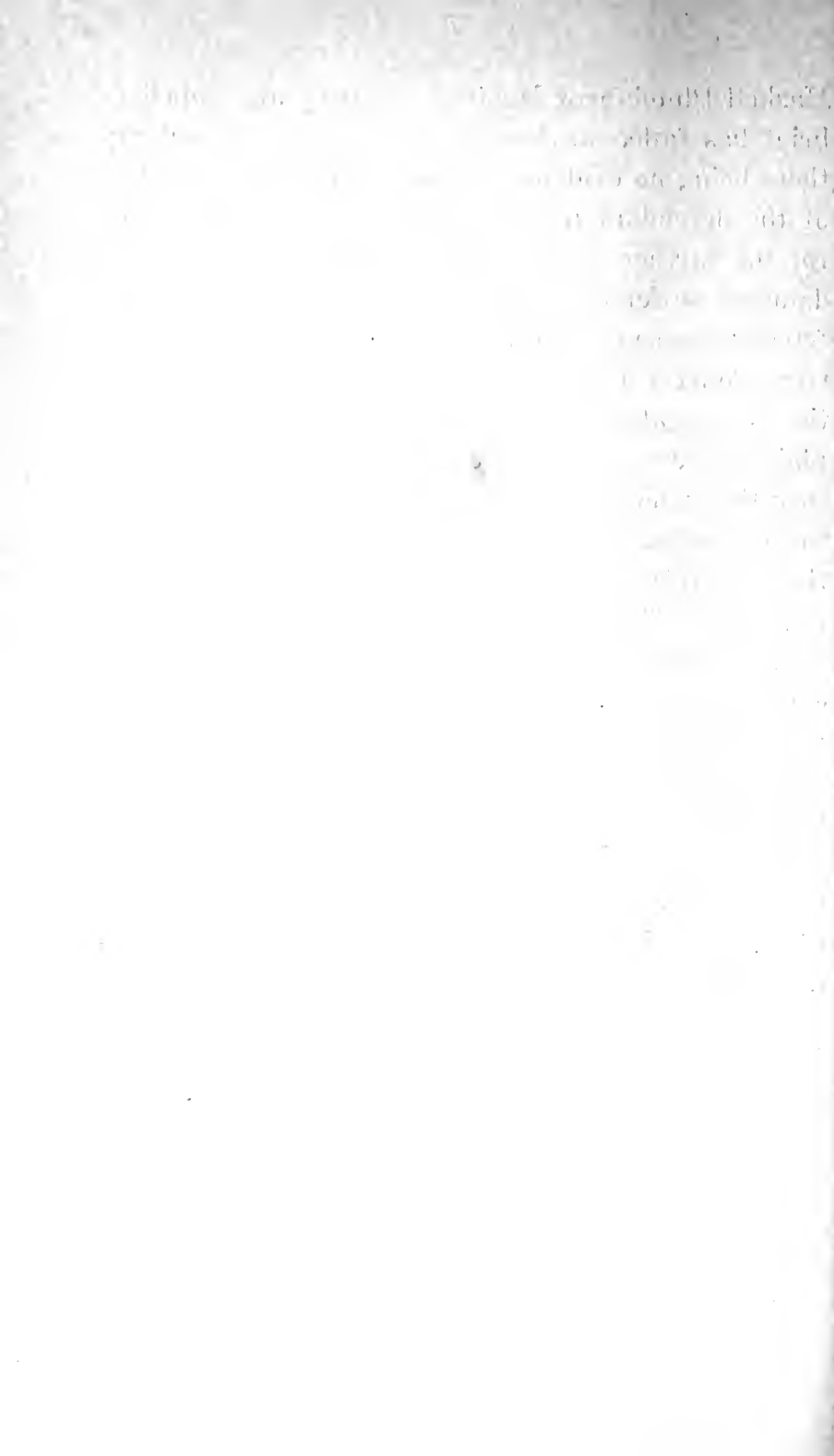
Dated, Anchorage, Alaska,  
March 2, 1956.

Respectfully submitted,

BELL, SANDERS & TALLMAN,

By BAILEY E. BELL,

*Attorneys for Appellant.*



No. 14725

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United States  
Court of Appeals  
for the Ninth Circuit

---

FRANKLIN SANTOS BOHOL and HENRY  
TORRES DIAS, Appellants,  
vs.

UNITED STATES OF AMERICA, Appellee.

---

Transcript of Record

---

Appeal from the United States District Court for the  
District of Hawaii

FILED

JUL 11 1957

PAUL E. GARRIN, CLERK





No. 14725

---

United States  
Court of Appeals  
for the Ninth Circuit

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FRANKLIN SANTOS BOHOL and HENRY  
TORRES DIAS, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
District of Hawaii



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

For the Appellee: United States of America,

LOUIS B. BLISSARD,  
United States Attorney,  
Federal Building,  
Honolulu, T. H.

For the Appellants:

FRANKLIN SANTOS BOHOL and  
HENRY TORRES DIAS,  
GEORGE Y. KOBAYASHI,  
Room 1, Campbell Block,  
Honolulu, Hawaii.



## Cr. No. 10906

UNITED STATES OF AMERICA,      Plaintiff,  
vs.  
FRANKLIN SANTOS BOHOL and HENRY  
TORRES DIAS,                  Defendants.

(21 USC, Section 174 (26 USC, Section 2553(a)))

## The Grand Jury Charges:

Count II.

The Grand Jury Further Charges:

That on or about November 8, 1954, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Franklin Santos Bohol and Henry Torres Dias, the identical persons named in Count I of this Indictment, did

knowingly, wilfully, unlawfully and feloniously sell, dispense and distribute to Clifford Kim Hee Kam a narcotic drug, to wit, nine (9) capsules containing heroin hydrochloride, which narcotic drug was not then and there in the original stamped package and was not from the original stamped package, in violation of Title 26, United States Code, Section 2553(a).

### Count III.

The Grand Jury Further Charges:

That on or about November 9, 1954, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Franklin Santos Bohol and Henry Torres Dias, the identical persons named in Counts I and II of this Indictment, did wilfully, unlawfully and feloniously, fraudulently and knowingly sell to Clifford Kim Hee Kam a narcotic drug, to wit, ten (10) capsules containing heroin hydrochloride, after importation, knowing the said narcotic drug to have been imported into the United States contrary to law, in violation of Title 21, United States Code, Section 174.

### Count IV.

The Grand Jury Further Charges:

That on or about November 9, 1954, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Franklin Santos Bohol and Henry Torres Dias, the identical persons named in Counts I, II and III of this Indictment, did knowingly, wilfully, unlawfully and feloniously sell, dispense and distribute to Clifford



Kim Hee Kam a narcotic drug, to wit, ten (10) capsules containing heroin hydrochloride, which narcotic drug was not then and there in the original stamped package and was not from the original stamped package, in violation of Title 26, United States Code, Section 2553(a).

Dated: Honolulu, T. H., this 13th day of December, 1954.

A True Bill.

/s/ ROBERT W. CHALMERS,  
Foreman, Grand Jury  
/s/ LOUIS B. BLISSARD,  
United States Attorney

[Endorsed]: Filed December 13, 1954.

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[Title of District Court and Cause.]

### VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled cause, do hereby find the defendants:

As to Count I: Franklin Santos Bohol, Guilty;  
Henry Torres Dias, Guilty.

As to Count II: Franklin Santos Bohol, Guilty;  
Henry Torres Dias, Guilty.

As to Count III: Franklin Santos Bohol, Guilty;  
Henry Torres Dias, Guilty.

As to Count IV: Franklin Santos Bohol, Guilty;  
Henry Torres Dias, Guilty.

as charged in the indictment herein.

Dated: Honolulu, T. H., this 18th day of January, 1955.

/s/ WILLIAM B. FAIMON,  
Foreman

[Endorsed]: Filed January 18, 1955.

---

In the District Court of the United States  
for the District of Hawaii

No. 10,906—Cr.

United States of America vs. Franklin Santos  
Bohol and Henry Torres Dias.

### JUDGMENT AND COMMITMENT

On this 19th day of January, 1955, came the attorney for the government and the defendant Henry Torres Dias appeared in person and by counsel, George Kobayashi, Esq.,

It is Adjudged that the defendant has been convicted upon his plea of not guilty as to all Counts and a verdict of guilty as to Counts I, II, III and IV of the offense of wilfully, unlawfully and feloniously, fraudulently and knowingly selling to another narcotic drugs, after importation, knowing said narcotic drugs to have been imported into the U. S. contrary to law, in violation of 21 USC §174; and of knowingly, wilfully, unlawfully and feloniously selling, dispensing and distributing to another narcotic drugs which were not then and there in the original stamped package or from the original

stamped package, in violation of 26 USC §2553(a) as charged in Counts I, II, III and IV and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years as to Count I.

It Is Further Adjudged that the defendant pay a fine in the sum of One Dollar (\$1.00).

It Is Ordered that sentence as to Counts II, III and IV be imposed after receipt of pre-sentence report from the Probation Officer.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ JON WIIG,

United States District Judge

/s/ WM. F. THOMPSON, JR.,

Clerk

Marshal's Return attached.

In the District Court of the United States  
for the District of Hawaii

No. 10,906—Cr.

United States of America vs. Franklin Santos  
Bohol and Henry Torres Dias.

### JUDGMENT AND COMMITMENT

On this 9th day of February, 1955, came the attorney for the government and the defendant Henry Torres Dias appeared in person and by counsel; George Kobayashi, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty as to all Counts and a verdict of guilty as to Counts I, II, III and IV of the offense of wilfully, unlawfully and feloniously, fraudulently and knowingly selling to another narcotic drugs, after importation, knowing said narcotic drugs to have been imported into the U. S. contrary to law, in violation of 21 USC, §174; and of knowingly, wilfully, unlawfully and feloniously selling, dispensing and distributing to another narcotic drugs which were not then and there in the original stamped package or from the original stamped package, in violation of 26 USC, §2553(a) as charged in Counts I, II, III and IV and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years as to Count II, to run concurrently with sentence imposed under Count I; Five (5) Years as to Count III, and Five (5) Years as to Count IV, to run concurrently with each other, but consecutive to sentences imposed as to Counts I and II.

Sentence of imprisonment under Count II to begin as of January 19, 1955.

It Is Further Adjudged that defendant pay a fine in the sum of One Dollar (\$1.00) as to each of Counts II, III and IV.

Mittimus issued forthwith.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ JON WIIG,

United States District Judge

/s/ WM. F. THOMPSON, JR.,

Clerk

Marshal's Return attached.

In the District Court of the United States  
for the District of Hawaii

No. 10,906—Cr.

United States of America vs. Franklin Santos  
Bohol and Henry Torres Dias.

### JUDGMENT AND COMMITMENT

On this 19th day of January, 1955 came the attorney for the government and the defendant Franklin Santos Bohol appeared in person and by counsel; George Kobayashi, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty as to all Counts and a verdict of guilty as to Counts I, II, III and IV of the offense of wilfully, unlawfully and feloniously, fraudulently and knowingly selling to another narcotic drugs, after importation, knowing said narcotic drugs to have been imported into the U. S. contrary to law, in violation of 21 USC §174; and of knowingly, wilfully, unlawfully and feloniously selling, dispensing and distributing to another narcotic drugs which were not then and there in the original stamped package or from the original stamped package, in violation of 26 USC §2553(a) as charged in Counts I, II, III and IV and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years as to Count I.

It Is Further Adjudged that the defendant pay a fine in the sum of One Dollar (\$1.00).

It Is Ordered that sentence as to Counts II, III and IV be imposed after receipt of pre-sentence report from the Probation Officer.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ JON WIIG,

United States District Judge

/s/ WM. F. THOMPSON, JR.,

Clerk

Marshal's Return attached.

---

In the District Court of the United States  
for the District of Hawaii

No. 10,906—Cr.

United States of America vs. Franklin Santos  
Bohol and Henry Torres Dias.

## JUDGMENT AND COMMITMENT

On this 9th day of February, 1955, came the attorney for the government and the defendant Franklin Santos Bohol appeared in person and by counsel; George Kobayashi, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty as to all Counts and a verdict of guilty as to Counts I, II, III and IV of the offense of wilfully, unlawfully and feloniously, fraudulently and knowingly selling to another narcotic drugs, after importation, knowing said narcotic drugs to have been imported into the U. S. contrary to law, in violation of 21 USC, §174; and of knowingly, wilfully, unlawfully and feloniously selling, dispensing and distributing to another narcotic drugs which were not then and there in the original stamped package or from the original stamped package, in violation of 26 USC, §2553(a) as charged in Counts I, II, III and IV and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years as to Count II, to run concurrently with sentence imposed under Count I; Five (5) Years as to Count III, and Five (5) Years as to Count IV, to run concurrently with each other, but consecutive to sentences imposed as to Counts I and II.

Sentence of imprisonment under Count II to begin as of January 19, 1955.



It Is Further Adjudged that defendant pay a fine in the sum of One Dollar (\$1.00) as to each of Counts II, III and IV.

Mittimus issued forthwith.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ JON WIIG,  
United States District Judge  
/s/ WM. F. THOMPSON, JR.,  
Clerk

Marshal's Return attached.

---

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Offenses: Appellants were charged on four counts as follows:

#### Count I.

Appellants were charged with wilfully, unlawfully and feloniously, fraudulently and knowingly sell to Clifford Kim Hee Kam a narcotic drug, to-wit, nine (9) capsules containing heroin hydrochloride, after importation, knowing the said narcotic drug to have been imported into the United States contrary to law, in violation of Title 21, United States Code, Section 174.

### Count II.

Appellants were charged with knowingly, wilfully, unlawfully and feloniously sell, dispense and distribute to Clifford Kim Hee Kam a narcotic drug, to-wit, nine (9) capsules containing heroin hydrochloride, which narcotic drug was not then and there in the original stamped package and was not from the original stamped package, in violation of Title 26, United States Code, Section 2553(a).

### Count III.

Appellants were charged with wilfully, unlawfully and feloniously, fraudulently and knowingly sell to Clifford Kim Hee Kam a narcotic drug, to-wit, ten (10) capsules containing heroin hydrochloride, after importation, knowing the said narcotic drug to have been imported into the United States contrary to law, in violation of Title 21, United States Code, Section 174.

### Count IV.

Appellants were charged with knowingly, wilfully, unlawfully and feloniously sell, dispense and distribute to Clifford Kim Hee Kam a narcotic drug, to-wit, ten (10) capsules containing heroin hydrochloride, which narcotic drug was not then and there in the original stamped package and was not from the original stamped package, in violation of Title 26, United States Code, Section 2553(a).

Judgment: Upon the verdict of the jury, Appellants were adjudged guilty on each and every count and sentenced on the 19th day of January, 1955 on

Count I to the maximum term of five years imprisonment and to pay a fine of One Dollar (\$1.00).

Name of Institution Where Now Confined: Oahu Penitentiary, Honolulu, Territory of Hawaii, after denial of bail pending appeal.

The above named Appellants hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated: Honolulu, Hawaii, January 24, 1955.

FRANKLIN SANTOS BOHOL and  
HENRY TORRES DIAS

By their Attorney  
/s/ GEORGE Y. KOBAYASHI

[Endorsed]: Filed January 24, 1955.

---

[Title of District Court and Cause.]

### AMENDED NOTICE OF APPEAL

Offenses: Appellants were charged on four counts as follows:

#### Count I.

Appellants were charged with wilfully, unlawfully and feloniously, fraudulently and knowingly sell to Clifford Kim Hee Kam a narcotic drug, to-wit, nine (9) capsules containing heroin hydrochloride, after importation, knowing the said narcotic drug to have been imported into the United States contrary to law, in violation of Title 21, United States Code, Section 174.

### Count II.

Appellants were charged with knowingly, wilfully, unlawfully and feloniously sell, dispense and distribute to Clifford Kim Hee Kam a narcotic drug, to-wit, nine (9) capsules containing heroin hydrochloride which narcotic drug was not then and there in the original stamped package and was not from the original stamped package, in violation of Title 26, United States Code, Section 2553(a).

### Count III.

Appellants were charged with wilfully, unlawfully and feloniously, fraudulently and knowingly sell to Clifford Kim Hee Kam a narcotic drug, to-wit, ten (10) capsules containing heroin hydrochloride, after importation, knowing the said narcotic drug to have been imported into the United States contrary to law, in violation of Title 21, United States Code, Section 174.

### Count IV.

Appellants were charged with knowingly, wilfully, unlawfully and feloniously sell, dispense and distribute to Clifford Kim Hee Kam a narcotic drug, to-wit, ten (10) capsules containing heroin hydrochloride, which narcotic drug was not from the original stamped package, in violation of Title 26, United States Code, Section 2553(a).

Judgment: Upon the verdict of the jury, Appellants were adjudged guilty on each and every count and sentenced on the 19th day of January, 1955 on Count I to the maximum term of five years

imprisonment and to pay a fine of One Dollar (\$1.00). Appellants were then sentenced on February 9, 1955 on Counts II, III, and IV to the maximum terms of five years imprisonment and to pay the fines of One Dollar (\$1.00) on each of said Counts II, III and IV.

Sentence of imprisonment under Count II is to run concurrently with the sentence imposed on Count I and to begin as of January 19, 1955; and sentences of imprisonment under Counts III and IV are to run concurrently with each other, but consecutively to Counts I and II.

Name of Institution Where Now Confined: Oahu Penitentiary, Honolulu, Territory of Hawaii, after denial of bail pending appeal.

The above named Appellants hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated: Honolulu, Hawaii, February 16, 1955.

FRANKLIN SANTOS BOHOL and  
HENRY TORRES DIAS

By Their Attorney  
/s/ GEORGE Y. KOBAYASHI

[Endorsed]: Filed February 16, 1955.

[Title of District Court and Cause.]

MOTION FOR BAIL PENDING APPEAL—  
AFFIDAVIT AND POINTS AND AUTH-  
ORITIES ON SUBSTANTIAL QUESTION  
ON APPEAL AS GROUND FOR BAIL  
PENDING REVIEW

Motion For Bail Pending Appeal

Comes now Franklin Santos Bohol and Henry Torres Dias, Defendants above named, by their attorney, George Y. Kobayashi, and move this Honorable Court for bail pending appeal.

Defendants respectfully represent unto this Court:

That on the 13th day of December, 1954, Defendants were indicted in four counts for violation of Title 21, United States Code, Section 174, and Title 26, United States Code, Section 2553(a).

That on the 17th day of December, 1954, Defendants were arraigned in the United States District Court for the District of Hawaii, and on the 23rd day of December, 1954, they entered a plea of not guilty to said indictment and trial thereof was set for the 18th day of January, 1955;

That on the 19th day of January, 1955, Defendants were found guilty by a jury, after trial on all four counts of said indictment; that upon verdict Defendants' bail were immediately cancelled and Defendants incarcerated in the Oahu Penitentiary, Honolulu, Hawaii;

Upon the verdict of the jury, Defendants were adjudged guilty on each and every count and sen-

tenced on the 19th day of January, 1955 on Count I to the maximum term of five years imprisonment and to pay a fine of One Dollar (\$1.00). Defendants were then sentenced on February 9, 1955 on Counts II, III, and IV to the maximum terms of five years imprisonment and to pay the fines of One Dollar (\$1.00) on each of said Counts II, III, and IV. Sentence of imprisonment under Count II is to run concurrently with the sentence imposed on Count I and to begin as of January 19, 1955; and sentences of imprisonment under Counts III and IV are to run concurrently with each other, but consecutively to Counts I and II;

That on the 24th day of January, 1955, a Notice of Appeal was filed with the Clerk of said Court;

That on the 16th day of February, 1955, an Amended Notice of Appeal was filed with the Clerk of said Court.

That this motion is made by Defendants for purpose of obtaining bail pending appeal; that the complete transcript of the record not being available, there is filed herewith the Affidavit of Counsel, showing the essence of substantial questions to be determined in this Court.

Dated at Honolulu, Hawaii, this 28th day of February, 1955.

FRANKLIN SANTOS BOHOL and  
HENRY TORRES DIAS,  
Defendants

/s/ By GEORGE Y. KOBAYASHI,  
Their Attorney

Affidavit of George Y. Kobayashi  
Territory of Hawaii,  
City and County of Honolulu—ss.

Comes now George Y. Kobayashi and being first duly sworn on oath, deposes and says:

That he is and at all times subsequent to the indictment of Defendants above named, has been the attorney for Defendants;

That the District Court erred in allowing the United States Attorney to ask of the Defendant, Franklin Santos Bohol, whether he had been convicted of a crime in 1954 and openly naming the date of said conviction; that the Defendant, Franklin Santos Bohol, had not been convicted of the crime in question; that the question was objected by counsel of the Defendants, and was prejudicial to both Defendants;

That the allowing by this District Court Judge of the question put to the Defendant, Franklin Santos Bohol, presents a substantial question on appeal entitling both Defendants to bail pending review; and

That the motion herein is well taken in law and is not frivolous nor taken for the purpose of delay;

And further affiant sayeth not other than that this affidavit is made for the purpose of complying with the provisions of Rule 17 of the Rules of the Court in the case of a motion for bail pending appeal, there being no available complete transcript of the record on appeal.

/s/ GEORGE Y. KOBAYASHI,  
Attorney for Defendants



Points and Authorities on Substantial Question on  
Appeal as Ground For Bail Pending Review

Appellants rely upon *Mitrovich vs. United States*,  
(CCA 9) 15 F.2d 163;

In the above case the trial Court, on cross-examination, permitted counsel to ask the witness if he had been arrested on a previous occasion, and witness answered. The ruling admitting the testimony was held to be both erroneous and prejudicial.

The Court quoting *Glover vs. United States*,  
(174 F. 426, 77 CCA 450) states:

“It is competent for the purpose of discrediting a witness to show that he has been convicted of a crime. The general rule is that the crime must rise to the dignity of a felony or petit larceny. Whatever may be the limit in this respect, nothing short of a conviction of a crime is admissible for the purpose of impeachment. A mere accusation or indictment will not be admitted for the reason that innocent men are often arrested and charged with a criminal offense.”

Dated at Honolulu, Hawaii, this 1st day of  
March, 1955.

FRANKLIN SANTOS BOHOL and  
HENRY TORRES DIAS,

Appellants

/s/ By GEORGE Y. KOBAYASHI,  
Their Attorney

[Endorsed]: Filed March 2, 1955.

[Title of District Court and Cause.]

## ORDER EXTENDING TIME TO PERFECT RECORD

It Is Hereby Ordered That Franklin Santos Bohol and Henry Torres Dias, Defendants in the above entitled cause, who heretofore filed a Notice of Appeal, on January 24, 1955, and an Amended Notice of Appeal on February 16, 1955, to the United States Court of Appeals for the Ninth Circuit from the Judgment entered therein, may have up to and including the 19th day of April, 1955, within which to file and docket the record on appeal with the United States Court of Appeals for the Ninth Circuit.

Dated at Honolulu, Hawaii, this 2nd day of March, 1955.

/s/ J. FRANK McLAUGHLIN,  
Judge, U. S. District Court for the  
District of Hawaii

[Endorsed]: Filed March 2, 1955.

DEFENDANTS' EXHIBIT "A"

Marked for Identification 3-10-55

In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii

Cr. No. 25915

TERRITORY OF HAWAII vs. FRANKLIN  
SANTOS BOHOL, Defendant.

Possession of Marihuana

MOTION FOR NOLLE PROSEQUI AND  
ORDER OF NOLLE PROSEQUI

Motion for Nolle Prosequi

Comes now the Territory of Hawaii, by George F. St. Sure, Esq., Assistant Public Prosecutor of the City and County of Honolulu, and hereby respectfully moves that this Honorable Court approve a motion for nolle prosequi in the above entitled cause on the ground that the evidence is insufficient to warrant further prosecution.

Wherefore, it is respectfully prayed that a nolle prosequi be entered herein.

Dated at Honolulu, T. H., this 24th day of September, A.D. 1953.

TERRITORY OF HAWAII,  
/s/ By GEORGE F. ST. SURE,  
Assistant Public Prosecutor

Order of Nolle Prosequi

The foregoing motion is approved and allowed

and it is hereby ordered that a nolle prosequi be entered herein.

Dated at Honolulu, T. H., this 25 day of September, A.D. 1953.

/s/ A. M. FELIX,

Judge of the above entitled  
Court

[Endorsed]: Filed September 25, 1953.

---

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

United States of America,  
District of Hawaii—ss.

I, William F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, numbered from Page 1 to Page 171, consists of a statement of the names and addresses of the attorneys of record, and of the various pleadings, transcripts of proceedings, and a document marked for identification as hereinbelow listed and indicated:

Indictment.

Verdict.

Judgment and Commitment, Henry Torres Dias,  
January 19, 1955.

Judgment and Commitment, Henry Torros Dias,  
February 9, 1955.

Judgment and Commitment, Franklin Santos Bohol, January 19, 1955.

Judgment and Commitment, Franklin Santos Bohol, February 9, 1955.

Notice of Appeal.

Amended Notice of Appeal.

Motion for Bail Pending Appeal, Affidavit and Points and Authorities on Substantial Question on Appeal as Ground for Bail Pending Review.

Order Extending Time to Perfect Record.

Defendants' Exhibit "A" marked for identification.

Transcript of Proceedings, January 18, 1955.

Transcript of Proceedings, March 10, 1955.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 12th day of April, A.D. 1955.

[Seal]        /s/ WM. F. THOMPSON, JR.,  
Clerk, United States District Court, District of  
Hawaii.

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[Title of District Court and Cause.]

## TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the U. S. District Court, Honolulu, T. H., on January 18, 1955, at 9:00 a.m.

Before Hon. Jon Wiig, Judge, and a jury.

Appearances: Louis B. Blissard, U. S. Attorney, and Charles B. Dwight, Asst. U. S. Attorney, ap-

pearing for the Plaintiff. George Y. Kobayashi,  
appearing for the Defendants. [27\*]

FRANKLIN SANTOS BOHOL

a witness on behalf of the Defendants, being duly  
sworn, testified as follows:

Direct Examination

\* \* \* \* \* [125]

Q. (By Mr. Kobayashi): And, Mr. Bohol, you  
were convicted once for possession of marijuana in  
the Territory? A. Yes, sir.

Q. It was a misdemeanor? A. Misdemeanor.

Mr. Kobayashi: That's all. \* \* \* \* \*

Cross Examination

Q. (By Mr. Blissard): Mr. Bohol, when were  
you convicted of marijuana? A. It was '51.

Q. 1951? A. 1951.

Q. Is that the only time you have been con-  
victed of a marijuana or narcotic offense?

A. Yes, sir. [126]

Q. Weren't you convicted in the District Court  
in Honolulu in 1953 again for possession of mari-  
juana?

A. You mean since? Marijuana seeds?

Q. Were you convicted in 1953 for the posses-  
sion of marijuana seeds? Is that what you are  
saying?

---

\* Page numbers appearing at foot of page of original Reporter's  
Transcript of Record.

(Testimony of Franklin Santos Bohol.)

Mr. Kobayashi: Your Honor, I object. If counsel knows anything about these convictions—I don't know about these convictions.

The Court: I assume that Mr. Blissard knows what he is doing, Mr. Kobayashi.

Q. (By Mr. Blissard): Were you or were you not convicted in July, 1953, for possession of marijuana? A. Yes.

Q. So you had been convicted twice?

A. But I didn't go to jail for it.

Q. You didn't go to jail for it?

\* \* \* \* \* [127]

[Endorsed]: Filed April 4, 1955.

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[Title of District Court and Cause.]

## TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter held in the U. S. District Court, Honolulu, T. H., on March 10, 1955, at 2:00 p.m., before Hon. Jon Wiig, Judge. [157]

\* \* \* \* \*

Mr. Kobayashi: Well, your Honor, the only questions that Mr. Blissard is entitled to ask are convictions. And here, as I understand it, Mr. Blissard had the records before him, he was asking these questions from a sheet on which he had a list of convictions. And first he asked him if there was a conviction in '51. That was the conviction we asked about.

The Court: That is right.

Mr. Kobayashi: Then he asked about a conviction in '53. Now, my contention is that under the Rule in the Mitrovich case Mr. Blissard could not have asked that question, because there was a conviction—it was a District Court conviction—but on a trial de novo there was an order of nolle prosequi entered. It is no different than asking a person for any arrests, especially in a case where there was no conviction at all. As far as the record is concerned, there was no conviction at all. Under our [161] Territorial law, when a case is appealed to the Circuit Court, then it becomes a trial de novo. There is no conviction there, especially in the case where an order of nolle prosequi is entered. I asked him a question. He is entitled to question him on convictions, your Honor, I grant you that.

The Court: But he is entitled to cross-examine on matters brought out by you on direct examination.

Mr. Kobayashi: Yes, but not—the man answered one conviction. That was his answer, one conviction. Correction. He said there was one conviction in 1951, and then on cross examination he answered the question, there was one conviction in 1951. Then he was asked the question concerning 1953.

The Court: Well, he had been convicted in the District Court of a marijuana offense in 1953, but he appealed to the Circuit Court; is that correct?

Mr. Kobayashi: That is correct, yes.

The Court: All right. Well, as I understand it, that was not for the purpose of showing the prior conviction but for the purpose of testing the credi-



bility of the witness. He said that he had been convicted once, whereas, in fact, he had been convicted twice, regardless of whether or not an appeal had been taken. And I think that was a matter for you to clarify, if it needed any clarification, on [162] redirect examination. He was your witness.

Mr. Kobayashi: Well, your Honor, it was impossible for me at that time to know about these convictions. I didn't have any records before me. He knew, as far as Mr. Blissard is concerned. I thought maybe there was another conviction that I didn't know anything about. He could have pleaded guilty to another case without my knowledge, your Honor. But as far as I knew, there was one conviction. I spoke to this defendant. He said there was one conviction in 1951. Now, the other case, I knew there was one in '53 which was nolle prosequied. That I knew of. Now, there could have been another one in '53. And I objected at that time and the Court said, "Mr. Blissard knows what he is doing." I thought he needed the record before him because he was looking at this record of convictions. And the reason why I am offering this order of nolle prosequi is to show there was no conviction in '53. That was appealed and nolle prosequied. That is no conviction under the Territorial statutes where when a case is appealed from the District Court it is back to a trial de novo. By becoming a trial de novo, the conviction or acquittal in the Circuit Court becomes his record. Let's carry it a step further. Let's say there was a conviction in the District Court and it is appealed to the Circuit

Court and let's say there was an acquittal. Surely the Court [163] could not say that man was convicted of any crime. He wasn't convicted of any crime at all. His record would be clear. And that is the point that I want to bring out with this order of nolle prosequi, to show that there was no conviction at all in this '53 case. Otherwise, every person that has been convicted in a District Court and is subsequently tried in the Circuit Court and acquitted would have a record. They would have a conviction if we do not hold otherwise, especially in our jurisdiction where any trial in the Circuit Court is a trial de novo. And it was for that reason that I felt and believed that the order of nolle prosequi in the Circuit Court, a certified copy, would be admissible in evidence at this time, because there was an error committed.

\* \* \* \* \*

[Endorsed]: Filed April 8, 1955.

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[Endorsed]: No. 14725. United States Court of Appeals for the Ninth Circuit. Franklin Santos Bohol and Henry Torres Dias, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed: April 13, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 14725

FRANKLIN SANTOS BOHOL and HENRY  
TORRES DIAS, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

STATEMENT OF POINT

Comes now Franklin Santos Bohol and Henry Torres Dias, Appellants above named, by George Y. Kobayashi, their attorney, and hereby makes their statement of point intended to be relied upon on appeal, to-wit:

That the Court erred in allowing the United States Attorney to question one of the Defendants, Franklin Santos Bohol, about his conviction of a marihuana offense of which he was convicted in the District Court of Honolulu, Territory of Hawaii, but which on appeal, was nolle prosequied in the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

Dated at Honolulu, Hawaii, this 12th day of April, 1955.

FRANKLIN SANTOS BOHOL and  
HENRY TORRES DIAS,

Appellants,

/s/ By GEORGE Y. KOBAYASHI,

Their Attorney

Acknowledgment of Service attached.

[Endorsed]: Filed April 13, 1955. Paul P.  
O'Brien, Clerk.



**No. 14,725**  
**United States Court of Appeals**  
**For the Ninth Circuit**

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FRANKLIN SANTOS BOHOL and  
HENRY TORRES DIAS,  
*Appellants,*

VS.

UNITED STATES OF AMERICA,  
*Appellee.*

On Appeal from the United States District Court  
for the Territory of Hawaii.

**BRIEF FOR APPELLANTS.**

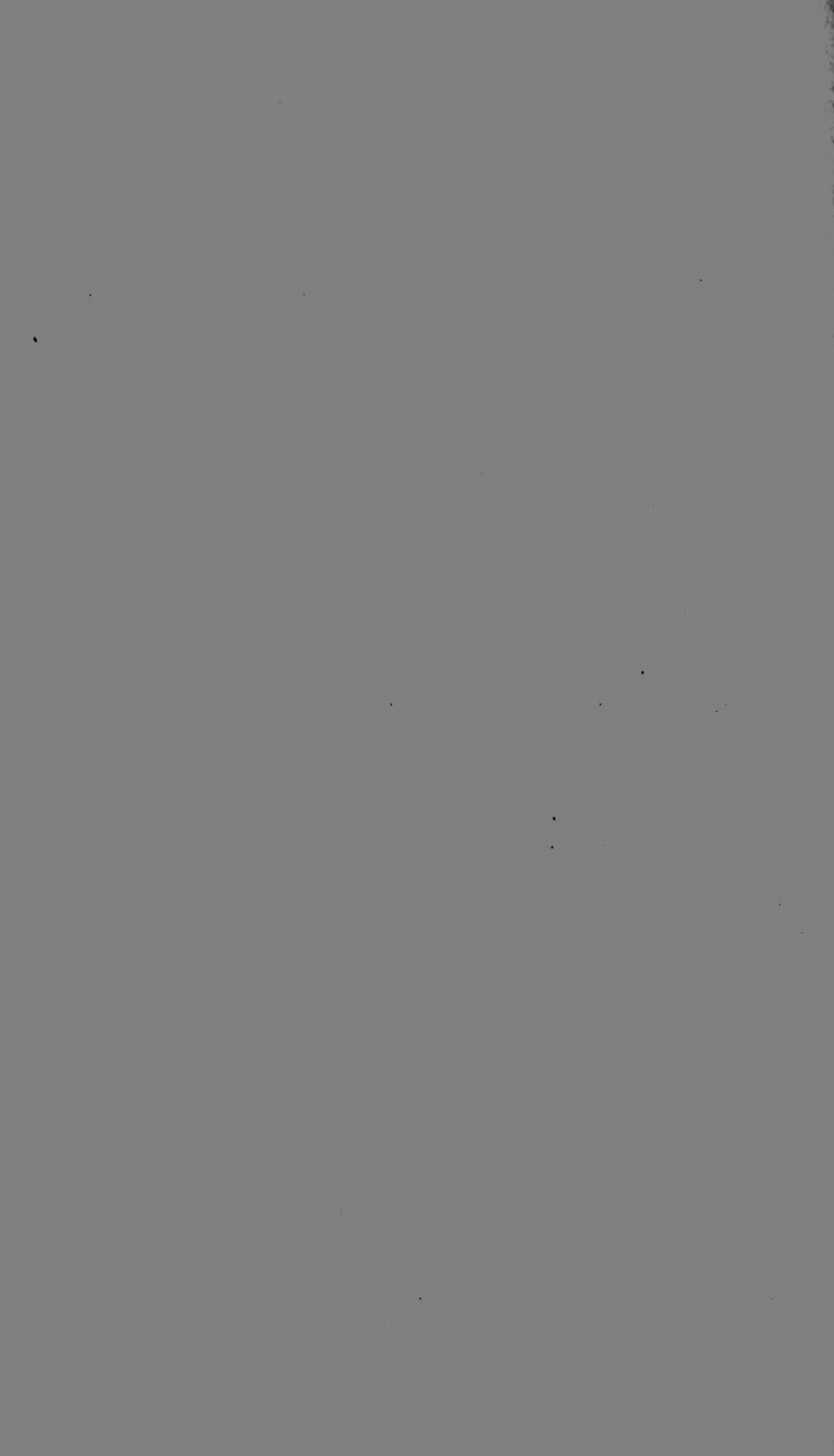
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GEORGE Y. KOBAYASHI,  
Room 1, Campbell Block, Honolulu, Hawaii.  
*Attorney for Appellants.*

**FILED**

**JUL 20 1955**

**PAUL P. O'BRIEN, CLERK**



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FRANKLIN SANTOS BOHOL and  
HENRY TORRES DIAS,  
*Appellants,*  
vs.  
UNITED STATES OF AMERICA,  
*Appellee.*

**BRIEF FOR APPELLANTS.**

**STATEMENT OF JURISDICTION.**

By indictment returned by a grand jury in the United States District Court for the District of Hawaii it is charged that Appellants "wilfully, unlawfully and feloniously, fraudulently and knowingly sell to Clifford Kim Hee Kam a narcotic drug, to-wit, nine (9) capsules containing heroin hydrochloride, after importation, knowing the said narcotic drug to have been imported into the United States contrary to law, and knowingly, wilfully, unlawfully and feloniously sell, dispense and distribute to Clifford Kim

Hee Kam a narcotic drug, to-wit, nine (9) capsules containing heroin hydrochloride, which narcotic drug was not then and there in the original stamped package and was not from the original stamped package." Upon conviction they were sentenced on the 19th day of January, 1955, on count I to the maximum term of five years imprisonment and to pay a fine of one dollar (\$1.00). Appellants were then sentenced on February 9, 1955 on counts II, III and IV to the maximum terms of five years imprisonment and to pay the fines of one dollar (\$1.00) on each of said counts II, III and IV. Sentence of imprisonment under count II is to run concurrently with the sentence imposed on count I and to begin as of January 19, 1955; and sentences of imprisonment under counts III and IV are to run concurrently with each other, but consecutively to counts I and II.

The jurisdiction of this Court to review the judgment of the District Court derives from Title 28 of the United States Code, "Judiciary and Judicial Procedure," Sections 1291 and 1294.

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## II

### **STATEMENT OF THE CASE.**

An indictment purporting to charge Appellants with violations of Section 174, of Title 21 of the United States Code and Section 2553(a) of Title 26 of the United States Code was found by a United States grand jury in the District of Hawaii on December 13, 1954.

The Appellants were tried jointly and upon cross-examination of one of the Appellants, Franklin Santos Bohol, the United States Attorney questioned him on a conviction in 1953 in the District Court of Honolulu, which upon appeal to the Circuit Court of Honolulu was nolle prosequied. The question by the United States Attorney was objected to in as much as the Appellant, Franklin Santos Bohol, was not convicted in 1953.

---

### III

#### **SPECIFICATION OF ERROR RELIED UPON.**

That the Court erred in allowing the United States Attorney to question one of the Appellants, Franklin Santos Bohol, about his conviction of possession of marijuana seeds of which he was convicted in the District Court of Honolulu, Territory of Hawaii, but which on appeal, was nolle prosequied in the Circuit Court of the First Judicial Circuit, Territory of Hawaii. (R. pp. 23 and 24.)

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### IV

#### **ARGUMENT.**

The Appellants in this case were tried jointly, and one of the Appellants, Franklin Santos Bohol, was questioned about a case which was dismissed in the Circuit Court of the Territory of Hawaii. Although Franklin Santos Bohol was convicted in the Terri-

torial District Court, his case on appeal to the Circuit Court of the Territory of Hawaii was nolle prosecuted. (R. pp. 23 and 24.)

It has been definitely held in Hawaii that upon appeal from the Territorial District Courts to the Territorial Circuit Courts, a trial de novo is required. (30 H 468 at 470.) In view of this, Appellant, Franklin Santos Bohol was never convicted of the crime in 1953 for which he was questioned. The effect of the questioning by the United States Attorney of a crime for which Appellant, Franklin Santos Bohol, was not convicted was improper and prejudiced.

Justice Hughes in *Bates v. State*, 60 Ark. 450, 30 S. W. 890, very aptly stated that:

“A person charged with a crime, testifying in his own behalf, goes upon the stand under a cloud; he stands charged with a criminal offense, not only, but is under the strongest possible temptation to give evidence favorable to himself. His evidence is therefore looked upon with suspicion and distrust, and if, in addition to this, he may be subjected to a cross-examination upon every incident of his life, and every charge of vice or crime which may have been made against him, and which have no bearing upon the charge for which he is being tried, he may be so prejudiced in the minds of the jury as frequently to induce them to convict, upon evidence which otherwise would be deemed insufficient.”

In the case of *Mitrovich v. United States*, 15 F. (2d) 163, Defendant, on cross-examination, was asked whether he had not been arrested on one or more

previous occasions. The witness answered "Twice". The Court held that the ruling admitting the testimony was both erroneous and prejudicial. The Court, quoting from *Glover v. United States*, 147 F. 426, 429, 77 C.C.A. 450, 453, said:

"It is competent for the purpose of discrediting a witness to show that he has been convicted of a crime. The general rule is that the crime must rise to the dignity of a felony or petit larceny. \* \* \* Whatever may be the limit in this respect, nothing short of a conviction of a crime is admissible for the purpose of impeachment. A mere accusation or indictment will not be admitted, for the reason that innocent men are often arrested charged with criminal offense."

---

## V

### CONCLUSION.

It is respectfully submitted that Appellants were wrongfully convicted.

Dated, Honolulu, Hawaii,

July 14, 1955.

Respectfully submitted,

GEORGE Y. KOBAYASHI,

*Attorney for Appellants.*



No. 14,725

United States Court of Appeals  
For the Ninth Circuit

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FRANKLIN SANTOS BOHOL and HENRY TORRES DIAS,  vs.  UNITED STATES OF AMERICA,	<i>Appellants,</i>     <i>Appellee.</i>
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On Appeal from the United States District Court  
for the District of Hawaii.

BRIEF FOR APPELLEE.

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LOUIS B. BLISSARD,  
United States Attorney,  
District of Hawaii,

CHARLES B. DWIGHT III,  
Assistant United States Attorney,  
District of Hawaii,

LLOYD H. BURKE,  
United States Attorney,  
Northern District of California,  
*Attorneys for Appellee.*

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AUG 3 1955

PAUL P. O'BRIEN, CL





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# United States Court of Appeals For the Ninth Circuit

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FRANKLIN SANTOS BOHOL and HENRY TORRES DIAS,  vs.  UNITED STATES OF AMERICA,	<i>Appellants,</i>    <i>Appellee.</i>
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On Appeal from the United States District Court  
for the District of Hawaii.

## BRIEF FOR APPELLEE.

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### STATEMENT OF JURISDICTION.

#### I.

Appellee agrees with the statement of jurisdiction of Appellants (Appellants' Brief, pages 1-2).

#### II.

Appellee disagrees with Appellants' statement of the case (Appellants' Brief, pages 2, 3) in the following respects: On direct examination defendants' counsel questioned defendant Bohol concerning a con-

viction for possession of marihuana in the Courts of the Territory of Hawaii (R. 26). Subsequently, on cross-examination of this defendant, counsel for appellee questioned defendant about this and one other similar occurrence, that is, a conviction in the District Court of Honolulu (Magistrate's Court). (R. 26-27.) Defendants' Exhibit "A" marked for identification 3-10-55 (R. 23, 24) is, although printed, not a part of the record.

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### **SUMMARY OF ARGUMENT.**

Plaintiff's questioning of defendant Bohol, concerning his prior history in the narcotics field, is permissible cross-examination in view of Bohol's testimony on his case in chief.

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### **ARGUMENT.**

This case apparently presents a relatively novel question; the reason being the practice of defense attorneys in Hawaii of partially impeaching their own witnesses and exposing their character—notably the defendant when he takes the stand in his own defense.

At the outset it might be well to reflect on the reason for this practice. The first and most striking is to take the wind out of the prosecution's sails by impeaching your witness with his own convictions. Secondarily and importantly, it softens the effect of

showing intention or state of mind by prior similar acts or crimes where necessary on rebuttal.

With this premise in mind, we agree with appellants that to question defendants about prior arrests or convictions which were reversed is error unless the defendant himself has opened up the field. The prosecution, at least in United States Courts, is limited generally to questioning about convictions of felonies to impeach the defendants' credibility. *Metrovich v. U. S.*, 15 F. (2d) 163 (9 Cir. 1926); *Shockley v. U. S.*, 166 F. (2d) 704, (9 Cir. 1948); *Carlton v. U. S.*, 198 F. (2d) 795, (9 Cir. 1952).

The prosecution was not questioning Bohol out of the blue on previous felony convictions—it was pursuing an entirely different course.

The defense had opened up a field of cross-examination. They had questioned the defendant by asking about his conviction for his past dealings in marihuana.

It will be noted that the cross-examination went no further than dealing in marihuana.

In *Metrovich v. U. S.*, (9 Cir. 1926), 15 F. (2d) 163, cited and relied upon by the appellants (Appellants' Brief, pages 4-5), this Court at that time apparently had a novel situation such as this in mind, for at page 164 it is stated

“but there is nothing in the direct examination tending even remotely to show that the plaintiff in error had not been arrested for crime. No such question was asked, and no such answer

was made. The question propounded on the cross-examination was therefore wholly foreign to anything found in the direct examination.”

But here there is something significant in the direct examination.

“Q. (By Mr. Kobayashi.) And, Mr. Bohol, you were convicted once for possession of marijuana in the Territory?

A. Yes, sir.

Q. It was a misdemeanor?

A. A misdemeanor.

Mr. Kobayashi. That’s all.” (R. 26.)

Obviously *Metrovich* points to the fact that there are situations where questions on these matters may be asked as permissible cross-examination.

It can first be said that a defendant who takes the stand subjects himself to cross-examination like other witnesses. *Raffel v. U. S.*, 271 U.S. 494 (1926); *Madden v. U. S.*, (9 Cir. 1927), 20 F. (2d) 289; *Brown v. U. S.*, (9 Cir. 1953), 201 F. (2d) 767.

The problem facing the Court therefore is—was this permissible cross-examination ? The first possibility is that there is shown a prior history of dealing in narcotics. It would seem clear that defendant’s testimony had laid a foundation for some further delving into his past narcotic dealings. This questioning can touch even arrests. (*Banning v. U. S.*, 130 F. (2d) 330, cert. den. 317 U.S. 695.)

Here we have more than an arrest. There is a conviction in the District Court of Honolulu for the

particular offense about which defendant was questioned. Assuming *arguendo* that Defendants' Exhibit "A" marked for identification (R. 23-24) is before this Court and relates to the alleged error committed, we have the fact that for reasons of his own an Assistant Public Prosecutor for the City and County of Honolulu moved for a *Nolle Prosequi* and that his motion was granted in the Circuit Court of the First Judicial Circuit, Territory of Hawaii (R. 23-24). There is more than a mere arrest here. Where the defendant takes the stand in his own defense cross-examination is not restricted to the precise questions put to him on direct examination but covers the subject matter involved in such questions. The subject matter here involved was his prior dealings in narcotics. *Stewart v. U. S.*, 211 F. 41, (9 Cir. 1914); *Branch v. U. S.*, 171 F. (2d) 337 (D.C. Cir. 1948); *U. S. v. Kendall*, 165 F. (2d) 117 (7 Cir. 1947).

The second ground upon which this questioning is permissible cross-examination follows from the first. Other than strictly practical considerations what was accomplished by defense counsel in his questioning of Bohol? The only issue which could have been raised was defendant's character as a law abiding citizen. To be sure the defense is not raising the issue of his good character but conversely and for reasons of their own, as outlined above, his bad character was brought into issue.

When the defendant took the stand he placed in issue his character traits for truth and veracity. But

after he took the stand he placed in issue a further trait of character that of a law abiding citizen. Once this had been done how far could the government go. It can certainly question about defendant's arrests (*Michelson v. U. S.*, 335 U.S. 469). Again we re-emphasize the oddness of the question presented. Is it the province of the defendant to expose his bad character? If he does, should not the prosecution capitalize upon it?

One further point is to be made before entering into the technicalities of this case. Where is the manifest prejudice that the defendant complains of? He has raised this issue of marihuana convictions—misdemeanor convictions at that. Is it reversible error to question defendant on his brush with the law for a similar offense when defendant has raised the issue himself on his examination in chief. We think not. *Kelly v. U. S.*, 177 F. (2d) 280; *U. S. v. Tramaglino*, 197 F. (2d) 928.

The technicalities of this case raised some interesting points. The first relates to the specific objection made by counsel.

“Your Honor, I object. If counsel knows anything about these convictions.”

The objection apparently relates only to a lack of knowledge on the part of defendant's counsel. The grounds urged in the specification of error certainly does not relate to the grounds of the objection made.

In effect then there was no real objection made or ruled upon. If so, defendant cannot thereafter claim



error. *Beaty v. U. S.*, 203 F. (2d) 652, (4 Cir. 1953); *Olender v. U. S.*, 210 F. (2d) 795, (9 Cir. 1954); *Trice v. U. S.*, 211 F. (2d) 513 (9 Cir. 1954).

Secondly, there is nothing in the record to indicate that Plaintiff's Exhibit "A" marked for identification was ever admitted for any purpose. (R. 23, 24, 25, 26, 27, 28, 29, 30.) Finally, there is no tie-up of the exhibit marked for identification (R. 23, 24) with the specific offense in question. (Ref. R. 28, 29.) Third, there is no denial on the part of defendant that there was a conviction of the defendant in the District Court of Honolulu for the offense. There is instead what might be termed a confession and avoidance on the part of the defense. See discussion *supra* re *Nolle Prosequi*.

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### CONCLUSION.

That questioning by plaintiff was proper cross-examination. We think it was within the scope of the direct examination, in view of the defendant's testimony on direct. We think it was proper probing of defendant's character put in issue by the defendant. Further plaintiff contends that if this questioning was error it was not reversible error in view of defendant's testimony. Further it appears that if an error was committed there has been no proper preservation of it by proper objection and defendant has waived the error.

It is respectfully submitted that the judgment and sentence of the District Court be affirmed.

Dated, Honolulu, T. H.,

August 19, 1955.

LOUIS B. BLISSARD,

United States Attorney,

District of Hawaii,

By CHARLES B. DWIGHT III,

Assistant United States Attorney,

District of Hawaii,

LLOYD H. BURKE,

United States Attorney,

Northern District of California,

*Attorneys for Appellee.*

No. 14726

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**United States  
Court of Appeals**  
for the Ninth Circuit

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CORNELIUS P. COUGHLAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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**Transcript of Record**

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**Appeal from the District Court  
for the District of Alaska,  
Fourth Division**

**FILED**

**JAN - 3 1956**



No. 14726

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**United States  
Court of Appeals**  
for the Ninth Circuit

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CORNELIUS P. COUGHLAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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**Transcript of Record**

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**Appeal from the District Court  
for the District of Alaska,  
Fourth Division**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## ATTORNEYS OF RECORD

THEODORE F. STEVENS,

U. S. Attorney,

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Fairbanks, Alaska;

GEORGE M. YEAGER,

Asst. U. S. Attorney,

Box 111,

Fairbanks, Alaska;

PHILIP W. MORGAN,

Asst. U. S. Attorney,

Box 111,

Fairbanks, Alaska;

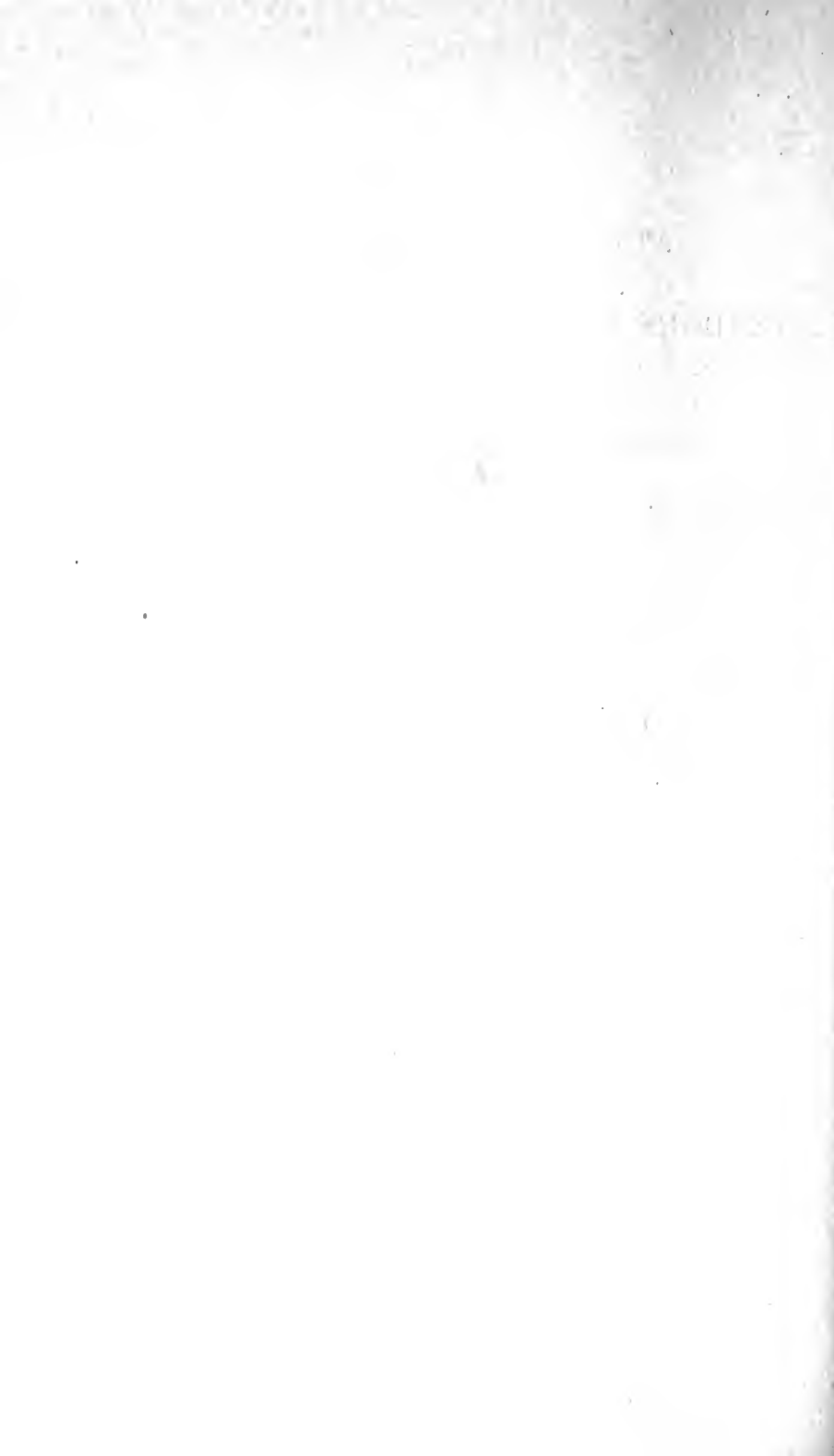
Attorneys for Petitioner and Appellee.

CORNELIUS P. COUGHLAN,

c/o Steel Hotel,

Fairbanks, Alaska,

Attorney pro se for Respondent and Appellant.



In the District Court for the District of Alaska,  
Fourth Judicial Division

No. 7521

In the Matter of

The Disbarment of CORNELIUS P. COUGHLAN,  
Attorney at Law.

### INFORMATION

Comes now T. N. Gore, Jr., Assistant United States Attorney for the District of Alaska, Fourth Judicial Division, and proceeding under the provisions of sub-section 1, Section 35-2-71, Alaska Compiled Laws Annotated, 1949, and at the written request of the Tanana Valley Bar Association, through its members, respectfully informs the Court as follows:

#### I.

That the above-named Cornelius P. Coughlan is an attorney at law admitted to practice in the Territory of Alaska, and at all times hereinafter mentioned he has resided in, and practiced law in, the Town of Fairbanks, Alaska.

#### II.

That on the 12th day of December, 1952, the said Cornelius P. Coughlan was found guilty and convicted of four (4) counts of the crime of embezzlement, a felony under the laws of the Territory of Alaska, by a regular trial jury, sitting in the District Court for the District of Alaska, Fourth Divi-

sion, in the case of "United States of America vs. C. P. Coughlan" cause No. 1651 Criminal, the records and files of said cause No. 1651 Criminal being incorporated herein by reference and made a part hereof, as though set out in full, and on the 9th day of May, 1953, defendant was sentenced.

Wherefore, because the said Cornelius P. Coughlan has violated his oath, duties and obligations as an attorney at law, and is guilty of unlawful misconduct in the practice of his profession and having been convicted of a felony, all of which shows his unfitness to manage the business of others in his capacity as an attorney, or to serve as an officer of this Court, as herein above set forth; it is prayed of this Honorable Court that the said Cornelius P. Coughlan be permanently disbarred from the practice of law within the Territory of Alaska, and that such necessary orders issue to effect the premises.

Dated at Fairbanks, Alaska, this 19th day of May, 1953.

/s/ T. N. GORE, JR.,

Asst. United States Attorney.

Duly verified.

[Endorsed]: Filed May 19, 1953.



[Title of District Court and Cause.]

ORDER

Whereas, in the above-entitled action there has been filed a verified Information praying for the disbarment of the above-named Cornelius P. Coughlan, as an attorney at law,

Now, Therefore, you, the above-named Cornelius P. Coughlan, are hereby required to appear and answer the above-mentioned Information in the above-styled Court within 7 days after service upon you of a copy of said Information and a copy of this Order.

Your appearance and answer, as above-mentioned, may be in writing, duly verified as required of pleadings in civil actions, and other pleadings, if any, shall conform to the Federal Rules of Civil Procedure.

In the event that you fail to so appear and answer, judgment for removal as an attorney at law will be entered against you, pursuant to the provisions of Sections 35-2-71 to 35-2-77, inclusive, Alaska Compiled Laws Annotated, 1949.

Done at Fairbanks, Alaska, this 19th day of May, 1953.

/s/ HARRY E. PRATT,  
District Judge.

[Endorsed]: Filed and entered May 19, 1953.

[Title of District Court and Cause.]

### AMENDED INFORMATION

Comes now T. N. Gore, Jr., Assistant United States Attorney for the District of Alaska, Fourth Judicial Division, and proceeding under the provisions of subsection 1, Section 35-2-71, Alaska Compiled Laws Annotated, 1949, and at the written request of the Tanana Valley Bar Association, through its members, respectfully informs the Court as follows:

#### I.

That the above-named Cornelius P. Coughlan is an attorney at law admitted to practice in the Territory of Alaska, and at all times hereinafter mentioned he has resided in, and practiced law in, the Town of Fairbanks, Alaska.

#### II.

That on the 12th day of December, 1952, the said Cornelius P. Coughlan was found guilty and convicted of four (4) counts of the crime of embezzlement, a felony under the laws of the Territory of Alaska, by a regular trial jury, sitting in the District Court for the District of Alaska, Fourth Division, in the case of "United States of America vs. C. P. Coughlan," cause No. 1651 Criminal, and that on the 9th day of May, 1953, defendant was sentenced to serve two (2) years on each of the four counts of embezzlement, to run consecutively, in a Federal Penitentiary, a copy of the Judgment and Commitment entered in said cause No. 1651

Criminal being attached hereto, marked Exhibit "A" and by this reference made a part hereof as though set forth in full herein.

Wherefore, because the said Cornelius P. Coughlan has violated his oath, duties and obligations as an attorney at law, and is guilty of unlawful misconduct in the practice of his profession and having been convicted of a felony, all of which shows his unfitness to manage the business of others in his capacity as an attorney, or to serve as an officer of this Court, as herein above set forth; it is prayed of this Honorable Court that the said Cornelius P. Coughlan be permanently disbarred from the practice of law within the Territory of Alaska, and that such necessary orders issue to effect the premises.

Dated at Fairbanks, Alaska, this 25th day of June, 1953.

/s/ T. N. GORE, JR.,

Asst. United States Attorney.

Receipt of copy hereby acknowledged.

Duly verified.

## EXHIBIT A

In the District Court for the Territory of Alaska,  
Fourth Judicial Division  
No. 1651 Cr.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

C. P. COUGHLAN,  
Defendant.

## JUDGMENT AND COMMITMENT

On the 9th day of May, 1953, came the attorney for the Government, and the defendant appeared in person, and as counsel for and on behalf of himself.

It Is Adjudged that the defendant has been convicted upon a verdict of guilty of the offenses charged in the four counts of the Indictment on file herein, to wit:

In Count I of the crime of Embezzlement by Employee, committed in the Fourth Judicial Division, Territory of Alaska, on the 17th day of December, 1951, by the defendant feloniously embezzling and converting to his own use the sum of One Thousand (\$1,000.00) Dollars, by making a check payable to himself and endorsing and cashing same against funds of the estate of Raymond Silver, deceased; said defendant being then and there employed as attorney at law by Frederick Donhauser, Administrator of the said Estate of Raymond Silver, de-

ceased, and entrusted with a Power of Attorney in fact as an incident to such employment to withdraw and disburse estate funds, and

In Count II of the crime of Embezzlement by Employee, committed in the Fourth Judicial Division, Territory of Alaska, on the 15th day of January, 1952, by the defendant feloniously embezzling and converting to his own use the sum of One Thousand (\$1,000.00) Dollars, by making a check payable to himself and endorsing and cashing same against funds of the estate of Raymond Silver, deceased; said defendant being then and there employed as attorney at law by Frederick Donhauser, Administrator of the said Estate of Raymond Silver, deceased, and entrusted with a Power of Attorney in fact as an incident to such employment to withdraw and disburse estate funds, and

In Count III of the crime of Embezzlement by Employee, committed in the Fourth Judicial Division, Territory of Alaska, on the 5th day of April, 1952, by the defendant feloniously embezzling and converting to his own use the sum of One Thousand (\$1,000.00) Dollars, by making a check payable to himself and endorsing and cashing same against funds of the estate of Raymond Silver, deceased; said defendant being then and there employed as attorney at law by Frederick Donhauser, Administrator of the said Estate of Raymond Silver, deceased, and entrusted with a Power of Attorney in fact as an incident to such employment to withdraw and disburse estate funds, and

In Count IV of the crime of Embezzlement by Employee, committed in the Fourth Judicial Division, Territory of Alaska, on the 3d day of October, 1951, by the defendant, being then and there employed as attorney at law by Frederick Donhauser, Administrator of the Estate of Raymond Silver, deceased, and as such employee having received for his care and custody a check in the amount of Nine Hundred Fifty (\$950.00) Dollars, representing the proceeds of a sale of property belonging to the said estate, feloniously presenting and cashing said check and converting the monies thereof to his own use;

And the Court, having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause being shown to the contrary, or appearing to the Court, and the Court being fully advised in the premises,

It Is Ordered and Adjudged:

(1) That the defendant is guilty as charged in Count I of said Indictment of the crime of Embezzlement by Employee, and that he be confined in the United States Penitentiary at McNeil Island, Washington, for a period of two (2) years, such sentence to commence on the 9th day of May, 1953;

(2) That the defendant is guilty as charged in Count II of said Indictment of the crime of Embezzlement by Employee, and that he shall be confined in the United States Penitentiary at McNeil Island, Washington, for a period of two (2) years, such sentence to commence on the termination of

the sentence of two (2) years imposed in Count I hereinabove mentioned;

(3) That the defendant is guilty as charged in Count III of said Indictment of the crime of Embezzlement by Employee, and that he shall be confined in the United States Penitentiary at McNeil Island, Washington, for a period of two (2) years, such sentence to commence on the termination of the sentences of two (2) years each imposed in Counts I and II hereinabove mentioned;

(4) That the defendant is guilty as charged in Count IV of said Indictment of the crime of Embezzlement by Employee, and that he shall be confined in the United States Penitentiary at McNeil Island, Washington, for a period of two (2) years, such sentence to commence on the termination of the sentences of two (2) years each imposed in Counts, I, II and III hereinabove mentioned.

It Is Further Ordered that the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshal, or other qualified officer, and that the same shall serve as the commitment herein, and that the said defendant pay the costs of this action in the sum of \$1,058.44 to be taxed by the Clerk of the Court.

Done at Fairbanks, Alaska, this 9th day of May, 1953.

/s/ HARRY E. PRATT,  
District Judge.

[Endorsed]: Filed June 25, 1953.

[Title of District Court and Cause.]

### MOTION TO QUASH AND DISMISS

Comes now the respondent in the above-entitled cause and respectfully moves the Court as follows, to wit:

To quash the service of process and to dismiss the above-entitled action for the reason that: the same does not conform with the laws of the Territory of Alaska in such cases made and provided.

/s/ C. P. COUGHLAN.

Receipt of copy acknowledged.

[Endorsed]: Filed May 26, 1953.

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[Title of District Court and Cause.]

### ORDER SETTING

The Government was represented by T. N. Gore, Assistant U. S. Attorney; the respondent was present and represented himself.

Mr. Gore moved for the setting of this cause for trial; Mr. Coughlan resisted the Motion to set the trial of this cause.

It was Ordered that the trial of this cause be set for 1:00 p.m., Friday, June 19, 1953.

Court was adjourned until 1:00 p.m., Friday, June 19, 1953.

\* \* \*

Entered June 18, 1953.



[Title of District Court and Cause.]

ORDER

The Government was represented by T. N. Gore, Assistant U. S. Attorney; the respondent was present in person and represented himself.

Respective counsel presented argument on the respondent's Motion to Quash and to dismiss the Petition.

It was Ordered that the motion to Quash be granted.

Court adjourned to 10:00 a.m., Wednesday, June 24, 1953.

\* \* \*

Entered June 23, 1953.

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[Title of District Court and Cause.]

MOTION

Comes now the Respondent above named, pro se, and respectfully moves the Court as follows, to wit:

For extension of time in which to plead.

Dated this 2nd day of July, 1953, at Fairbanks, Alaska.

/s/ C. P. COUGHLAN,  
Pro Se.

Address of Respondent:

Federal Jail, Fairbanks, Alaska.

Receipt of copy acknowledged.

[Endorsed]: Filed July 6, 1953.

United States Court of Appeals  
for the Ninth Circuit

No. 14,064

C. P. COUGHLAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Sept. 21, 1954

Appeal from the District Court for the District  
of Alaska, Fourth Division

Before: Denman, Chief Judge, and Bone and Orr,  
Circuit Judges.

Denman, Chief Judge:

Coughlan appeals from a judgment convicting him of several embezzlements in violation of Section 65-5-61 of the Alaska compiled laws, making felonies of such embezzlement. The pertinent sections of the indictment are:

“Count I.

“The Grand Jury charges in Count I of this Indictment:

“On the 17th day of December, 1951, in the Fourth Judicial Division and Territory of Alaska, C. P. Coughlan, being then and there employed as attorney at law by Frederic Donhauser, Administrator of the Estate of Raymond Silver, deceased, and entrusted with a Power

of Attorney in fact as an incident to such employment, to withdraw and disburse estate funds, feloniously embezzled and converted to his own use the sum of One Thousand (1,000.00) Dollars, by the said C. P. Coughlan making a check payable to himself and endorsing and cashing same against said estate funds, in violation of Section 65-5-61 of the Alaska Compiled Laws Annotated, 1949.”

Counts II and III charge the same offense at different dates.

“Count IV.

“The Grand Jury charges in Count IV of this Indictment:

“On the 3rd day of October, 1951, in the Fourth Judicial Division and Territory of Alaska, C. P. Coughlan, being then and there employed as attorney at law by Frederic Donhauser, Administrator of the Estate of Raymond Silver, deceased, and as such employee having received for his care and custody a check in the amount of Nine Hundred Fifty (950.00) Dollars, representing the proceeds of a sale of property belonging to the said estate, feloniously presented and cashed said check and converted the monies thereof to his own use, in violation of Section 65-5-61 of the Alaska Compiled Laws Annotated, 1949.”

The Government contends that the evidence shows that the administration of Mr. Donhauser

was of an estate in probate and that appellant had in fact been employed by Mr. Donhauser as attorney for the estate. Section 65-5-61 provides that such a felonious embezzlement must be by "any officer, agent, clerk or employee or servant of any private person or persons, copartnership or incorporation."

Coughlan contends (a) that an estate in probate is not a "private person" within the strict construction of the words "private person or a copartnership"; (b) that the indictment describes him as employed as an attorney at law acting under "a power of attorney in fact as an incident to such employment to withdraw and disburse estate funds" whereas it is admitted that no funds were withdrawn under such power of attorney which was given him; (c) that the court, in effect, amended the indictment by instructing the jury to ignore its charges that he acted under a power of attorney; (d) that the Alaska law specifically provides in § 65-5-66 for a misdemeanor punishment an embezzlement of an "attorney"; subsection 66 being one of the several laws of the compiled laws under the heading of "embezzlement," Alaska Compiled Laws page 2232 and that the several embezzlement provisions should be construed together strictly in favor of the accused. So considering them together the contention is that the specific provision for prosecuting Coughlan as an "attorney" under 66-5-66 confines his prosecution to the latter misdemeanor section and does not warrant a prosecu-

tion as "agent" under 66-5-61, the felony provision.

A. The four counts of the indictment being specifically confined to the provisions of § 66-5-61, require proof that the embezzlements must be by "any officer, agent, clerk or employee or servant of any private person or persons, copartnership or incorporation." The contention that the estate or its court appointed administrator was not a *private* person was raised by Coughlan's objection to the following instruction 1 (a), as follows:

1(a) "The jury is instructed that the laws of Alaska provide in substance:

" 'That if any \* \* \* employee \* \* \* of any private person \* \* \* shall embezzle or fraudulently convert to his own use \* \* \* any money which shall have come \* \* \* or be under his care by virtue of such employment, such \* \* \* employee \* \* \* shall be deemed guilty of embezzlement \* \* \*.' "

"Mr. Taylor: 'Now we are going to object to the giving of Instruction No. 1(a) upon the grounds that there was no testimony showing that the defendant was an employee of any private person \* \* \*.' " (Tr. pp. 601-602.)

It is elementary that these words "private person" of a criminal statute must be strictly construed. *United States vs. Wiltberger*, 5, Wheaton 76, 93. The word "officer" in 66-5-61 obviously here means the officer of a "corporation" later used in the sentence, not an officer appointed by a court

such as an administrator of an estate in probate. On embezzling from such an estate one is not taking funds from a private person. The prosecution did not maintain its burden of proof in this essential respect.

B. The indictment so construed must be deemed to charge the embezzlement as limited to one committed by Coughlan acting under a power of attorney from the administrator. It being admitted that he did not so act, the prosecution again failed to maintain its burden of proof.

C. The court erred in widening the scope of the indictment to all embezzlements, by instructing the jury to consider the indictment without limiting them to an offense done under the power of attorney.

D. The several statutes under Article 5 of the Criminal Code headed "Embezzlement" should be construed together. The heading of the code article reads:

#### Embezzlement

- §65-5-61 Embezzlement by employee or servant.
- §65-5-62. Embezzlement by bailee: Indictment.
- §65-5-63. Embezzlement of public money.
- §65-5-64. . . . . Verdict: Defense to prosecution.
- §65-5-65: Embezzlement by trustee.
- §65-5-66. Embezzlement by banker, broker, etc.

The sixth and last of the sections of Article 5 is the only one of the provisions in which the word "attorney" is used. The crime created is a misdemeanor, not a felony. The pertinent portions are:

"§65-5-66. Embezzlement by banker, broker, etc. That if any person, being a banker, broker, merchant, attorney, or agent, and *being intrusted with the property* of another, shall by any means, with intent to defraud, convert the same, or any portion thereof, to his own use or benefit \* \* \* "

The words "attorney or agent" must be construed as referring to an attorney at law, a mere attorney in fact being covered by the word "agent." Construing the six provisions together under such a title we think the offense charged against Coughlan comes under the misdemeanor provisions of §66-5-66 and not under the "agent" provision of §66-5-61, creating a felony.

The judgment is reversed and the indictment ordered dismissed.

(Endorsed): Opinion. Filed Sept. 21, 1954.

PAUL P. O'BRIEN,  
Clerk.

[Endorsed]: Filed September 27, 1954, D. C. Terr. of Alaska.

In the District Court for the District of Alaska,  
Fourth Judicial Division

No. 7521 Civil

In the matter of

The Disbarment of CORNELIUS P. COUGHLAN,  
Attorney at Law.

### AMENDED INFORMATION

Comes now Theodore F. Stevens, United States Attorney for the above District and Division and, pursuant to the authority of Section 35-2-72, Alaska Compiled Laws Annotated, 1949, informs this court as follows:

#### Count I.

That Cornelius P. Coughlan (C. P. Coughlan), an attorney admitted to practice before this Court, has committed a dishonest act, to wit: The said Cornelius P. Coughlan, on or about the 3rd day of October, 1951, being the attorney for Frederick P. Donhauser, Administrator for the Estate of Raymond Silver, deceased, in the Fourth Division, District of Alaska, and having received from the Lomen Commercial Company, Nome, Alaska, Nine Hundred and Fifty Dollars (\$950.00) in the form of a check, representing the proceeds from the sale of one three-quarter ton G.M.C. pick-up truck, which truck was an asset of said estate, did then and there cash said check and convert the proceeds thereof to his own use, contrary to the provisions of Section 35-2-71 (6) of the Alaska Compiled Laws Annotated,



1949, and that for said misconduct the said Cornelius P. Coughlan should be disbarred.

Count II.

That Cornelius P. Coughlan (C. P. Coughlan), an attorney admitted to practice before this court, has committed a dishonest act, to wit: The said Cornelius P. Coughlin, on or about the 17th day of December, 1951, being the attorney for Frederick P. Donhauser, Administrator for the Estate of Raymond Silver, deceased, in the Fourth Division, District of Alaska, and having been entrusted with the authority to dispense funds of said estate, then and there endorsed a check in the amount of One Thousand Dollars (\$1,000.00), made payable to C. P. Coughlan, cashed the same against said estate funds, and converted the proceeds of said check to his own use, contrary to the provisions of Section 35-2-71 (6) of the Alaska Compiled Laws annotated, 1949, and that for said misconduct the said Cornelius P. Coughlan should be disbarred.

Count III.

That Cornelius P. Coughlan (C. P. Coughlan), an attorney admitted to practice before this Court, has committed a dishonest act, to wit: the said Cornelius P. Coughlan, on or about the 15th day of January, 1952, being the attorney for Frederick P. Donhauser, Administrator for the Estate of Raymond Silver, deceased, in the Fourth Division, District of Alaska, and having been entrusted with the authority to dispense funds of said estate, then and there endorsed a check in the amount of One

Thousand Dollars (\$1,000.00), made payable to C. P. Coughlan, cashed the same against said estate funds, and converted the proceeds of said check to his own use, contrary to the provisions of Section 35-2-71 (6) of the Alaska Compiled Laws Annotated, 1949, and that for said misconduct the said Cornelius P. Coughlan should be disbarred.

#### Count IV.

That Cornelius P. Coughlan (C. P. Coughlan), an attorney admitted to practice before this Court, has committed a dishonest act, to wit; the said Cornelius P. Coughlan, on or about the 5th day of April, 1952, being the attorney for Frederick P. Donhauser, Administrator for the Estate of Raymond Silver, deceased, in the Fourth Division, District of Alaska, and having been entrusted with the authority to dispense funds of said estate, then and there endorsed a check in the amount of One Thousand Dollars (\$1,000.00), made payable to C. P. Coughlan, cashed the same against said estate funds, and converted the proceeds of said check to his own use, contrary to the provisions of Section 35-2-71 (6) of the Alaska Compiled Laws Annotated, 1949, and that for said misconduct the said Cornelius P. Coughlan should be disbarred.

Dated at Fairbanks, Alaska, this 17th day of December, 1954.

/s/ THEODORE F. STEVENS,  
United States Attorney.

[Endorsed]: Filed December 17, 1954.

[Title of District Court and Cause.]

Amended Order

Whereas, in the above-entitled action there has been filed an Amended Information praying for the disbarment of the above-named Cornelius P. Coughlan, as an attorney at law,

Now, Therefore, you, the above-named Cornelius P. Coughlan, are hereby required to appear and answer the above-mentioned Amended Information in the above-styled Court within Ten (10) days after service upon you of a copy of said Amended Information and a copy of this Order.

Your appearance and answer, as above mentioned, may be in writing, duly verified as required by Section 35-2-75 of the Alaska Compiled Laws Annotated, 1949.

You may appear to answer only, and your attention is directed to Section 35-2-75, Alaska Compiled Laws Annotated, 1949. No demurrer in any form other than in an answer will be considered by this Court. In the event you fail to appear and answer in the time above specified, this Court will proceed to determine the allegations of the Amended Information filed against you.

/s/ VERNON D. FORBES,  
District Judge.

[Endorsed]: Filed and entered December 17, 1954.

[Title of District Court and Cause.]

SUBPOENA DUCES TECUM

To: Theodore Stevens.

You Are Hereby Commanded to appear at Room 223 of the Lavery Building, 203 Cushman Street, Fairbanks, Alaska, at 1:00 p.m. on the 23rd day of December, 1954, to testify on behalf the Repondent C. P. Coughlan at Deposition hearing before W. W. Taylor, a notary public, and bring with you all of the files, records, correspondence, exhibits or other matters that you may have in your possession or control appertaining in any wise to Cornelius P. Coughlan, C. P. Coughlan or Jack Coughlan.

Dec. 22, 1954.

[Seal]      /s/ JOHN B. HALL,  
Clerk.

Return on service of writ attached.

[Endorsed]: Filed December 22, 1954.

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[Title of District Court and Cause.]

NOTICE

To: Theodore Stevens, United States Attorney,  
attorney for relator, Fairbanks, Alaska.

Please take notice that at 1:00 p.m. on the 23rd day of December, 1954, at Room 223 of the Lavery Building, 203 Cushman Street, Town of Fairbanks,

Fourth Judicial Division, Territory of Alaska, the respondent C. P. Coughlan, will take the deposition of Theodore Stevens, whose address is unknown, excepting that he is the United States Attorney at Fairbanks, Alaska, and occupies offices in the United States Court House and Post Office Building at Fairbanks, Alaska, upon oral examination before W. W. Taylor, a notary public. The oral examination will continue from day to day until completed.

/s/ C. P. COUGHLAN,  
Respondent.

Return on service of writ attached.

[Endorsed]: Filed December 22, 1954.

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[Title of District Court and Cause.]

MOTION TO QUASH SUBPOENA  
DUCES TECUM

Comes now, Theodore F. Stevens, United States Attorney for the Fourth Judicial Division, Territory of Alaska, and moves this Honorable Court to quash the subpoena duces tecum, issued under the name of the Clerk of this Court, on the ground that there is no foundation of law for the said subpoena to be issued for the United States Attorney to produce the files, records, correspondence, exhibits or other matters in his possession, pertaining to Cornelius P. Coughlan, C. P. Coughlan or Jack Coughlan. The United States Attorney has these records

in his possession pursuant to his authority under Section 35-2-72, Alaska Compiled Laws Annotated, 1949, and such evidence will be presented to this court pursuant to the provisions of the Alaska Code on the subject.

Also, said files, records, correspondence, exhibits and other matters in possession of the United States Attorney pertain to possible criminal actions against the said C. P. Coughlan and said evidence was obtained by the United States Attorney and his predecessors in office in accordance with law and are as records of the Department of Justice, privileged and confidential.

Dated at Fairbanks, Alaska, this 22nd day of December, 1954.

/s/ THEODORE F. STEVENS,  
United States Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed December 22, 1954.

---

[Title of District Court and Cause.]

### NOTICE OF HEARING

To the Above-Named Cornelius P. Coughlan, Respondent

You Are Hereby Notified that on the 22nd day of December, 1954, at the hour of 2:30 o'clock, p.m., or as soon thereafter as counsel may be heard, the

issues in the above-entitled cause, raised by the United States Attorney's motion to quash subpoena duces tecum, will be brought on for hearing.

Dated at Fairbanks, Alaska, this 22nd day of December, 1954.

/s/ THEODORE F. STEVENS,  
United States Attorney.

[Endorsed]: Filed December 22, 1954.

---

[Title of District Court and Cause.]

MOTION TO QUASH NOTICE  
OF DEPOSITION

Comes now the United States Attorney, Theodore F. Stevens, and moves this Honorable Court to quash the notice of deposition filed upon the United States Attorney on this 22nd day of December, 1954, for the reason that the Federal Rules of Civil Procedure are not applicable in this proceeding.

Dated at Fairbanks, Alaska, this 22nd day of December, 1954.

/s/ THEODORE F. STEVENS,  
United States Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed December 22, 1954.

[Title of District Court and Cause.]

### ORDER

The Petitioner was represented by Theodore F. Stevens, United States Attorney; the Respondent, C. P. Coughlan, represented himself.

Respective counsel had argument on the Petitioner's Motion to Quash the Subpoena Duces Tecum served on the Petitioner by the Respondent.

It was ordered that the Motion to Quash the Subpoena Duces Tecum be granted.

Mr. Coughlan presented argument resisting the Petitioner's Motion to Quash the Notice of the Taking of the Deposition of the Petitioner.

It was Ordered that the above Motion be granted.

Mr. Coughlan moved for an Extension of Time for him to answer the information in this cause and presented argument in support thereof.

Mr. Stevens resisted the Motion.

It was ordered that defendant have the statutory time, ten days, in which to procure counsel, file his Answer, and prepare his defense, or should he need more time, file verified affidavits with a motion for an Extension of Time by the 31st of December, 1954.

Entered December 22, 1954



[Title of District Court and Cause.]

MOTION

Comes Now the Respondent, above-named, pro se, and respectfully moves this honorable Court as follows, to wit:

That the Court issue an Order requiring the United States Attorney to produce and permit Respondent to inspect and to photograph all of the signatures of Frederick Donhauser, Frederick A. Donhauser and Frederick Donhauser, Adm. of the Estate of Raymond Silver, Deceased, that may be in his custody, control or possession.

The United States Attorney has the possession, custody or control of said signatures. They constitute or contain evidence relevant and material to a matter involved in this action.

Said signatures may or may not appear on confidential or otherwise privileged documents, hence the United States Attorney should be allowed to produce said signatures in a manner allowing for the protection of any confidential or otherwise privileged matters.

This Motion is based upon Rule 34 of the Federal Rules of Civil Procedure and other matters of record.

Dated at Fairbanks, Alaska, this 29th day of December, 1954.

/s/ C. P. COUGHLAN,

Respondent, Pro Se.

## Affidavit

United States of America,  
Territory of Alaska—ss.

I, C. P. Coughlan, being first duly sworn, on oath, depose and say as follows, to wit:

That I am the Resepondent in the aforesaid cause, That I have journeyed to the City of Anchorage, Third Judicial Division, Territory of Alaska, for the purpose of obtaining the services of an expert witness to examine the signatures of Frederick Donhauser, which are in the possession, control or custody of the United States Attorney, Fairbanks, Alaska. That I have brought the said expert witness to the Town of Fairbanks, Fourth Judicial Division, Territory of Alaska, for the purpose of an immediate examination of the aforesaid signatures, which are essential for the preparation of my Answer in the aforesaid cause.

That your affiant will be placed at a financial loss, if he is not allowed to have the aforesaid signatures examined and photographed on the 30th day of December, 1954. That it is an undue hardship on Respondent to keep the aforesaid expert witness in Fairbanks while awaiting an Order from this Court allowing said expert to examine and copy said signatures.

Further Affiant Sayeth not.

Dated at Fairbanks, Alaska, this 29th day of December, 1954.

/s/ C. P. COUGHLAN.

Subscribed and Sworn to Before me this 29th day of December, 1954.

[Seal]      /s/ JOHN B. HALL,  
Clerk.

Affidavit of service of copy attached.

[Endorsed]: Filed December 29, 1954.

---

[Title of District Court and Cause.]

MOTION

Comes Now the Respondent, above named, pro se, and respectfully moves this Honorable Court as follows, to wit:

That Respondent be granted additional time in which to answer or otherwise plead the information on file herein against him, and for reason therefor states that he has been unable to obtain the services of an attorney to represent him in this matter and, further, has been unable to procure expert advise essential to a proper preparation of his Answer. Respondent has made a diligent effort to obtain an attorney to represent him and has made a diligent effort to obtain the services of an expert for the purpose of properly preparing his Answer.

This Motion is based upon the Affidavit hereunto appended and other matters apparent of record.

Dated at Fairbanks, Alaska, this 30th day of December, 1954.

/s/ C. P. COUGHLAN,  
Respondent, Pro Se.

## Affidavit

United States of America,  
Territory of Alaska—ss.

I, C. P. Coughlan, being first duly sworn, on oath, depose and say as follows, to wit:

That your affiant is the Respondent in the above-entitled cause.

That your affiant does not wish to defend himself in this matter without the services of an attorney at law.

That your affiant has made a diligent effort to obtain the services of an attorney at law to represent him in the defense of this matter but has been unable to do so.

That your affiant has traveled to the City of Anchorage, Third Judicial Division, Territory of Alaska, in an effort to obtain the services of an attorney to represent him in this matter, but was unable to find one.

That your affiant finds it imperative that he obtain the services of an expert in order to properly prepare a defense to the charges contained in the information herein.

That your affiant traveled to the City of Anchorage, Third Judicial Division, Territory of Alaska, and procured the services of an expert and brought him to the Town of Fairbanks, Fourth Judicial Division, Territory of Alaska, for the purpose of examining certain evidence.

That your affiant was unable to contact the United States Attorney early enough on the 29th day of December, 1954, in order to have the said expert examine the evidence desired, and the said expert was unexpectedly called back to Anchorage.

That your affiant believes that he requires an extension of time up to and including the 31st day of January, 1955, to enable him to properly respond in this matter.

That Affiant has been diligent in his efforts to make a more rapid response herein, but has been prevented from doing so through no fault of his own.

That it is exceptionally difficult to obtain the services of an attorney to represent the interests of your affiant, as this Court was informed in open court on the 22nd day of December, 1954, by the United States Attorney.

That it is almost impossible to find properly qualified witnesses with the proper degree of expertness to advise affiant in the use of technical material to be used in his response; and that affiant knows of only one such person residing in the Territory of Alaska.

Further Affiant sayeth not.

Dated this 30th day of December, 1954.

/s/ C. P. COUGHLAN.

Subscribed and Sworn to before me on this 30th day of December, 1954.

[Seal]      /s/ JOHN B. HALL,  
Clerk of Court.

Receipt of copy acknowledged.

[Endorsed]: Filed December 30, 1954.

---

[Title of District Court and Cause.]

### ORDER AND ORDER SETTING

The Government was represented by Theodore F. Stevens, United States Attorney; the respondent was present and represented himself.

Counsel presented argument on the respondent's motion for additional time in which to answer the Amended Information herein.

It was Ordered that the Motion be granted, the Respondent to have until January 31, 1955, in which to prepare, serve, and file his Answer and the Hearing was set for 10:00 a.m., Monday, February 7, 1955.

\* \* \*

Entered December 30, 1954.

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[Title of District Court and Cause.]

### MOTION FOR RELEASE OF DOCUMENTS

Comes now the United States Attorney in the above matter and moves the Honorable Court to

order the United States Commissioner for the Fairbanks Precinct, Fourth Judicial Division, District of Alaska, to release the following documents from the official file of Probate No. 1416, being the Estate of Raymond Silver, Deceased:

1. Petition for appointment of Administrator of Deceased's Estate, notarized April 20, 1951, bearing the signatures of "Frederic Donhauser," Petitioner; C. P. Coughlan, Attorney for Petitioner, and Cornelius P. Coughlan, Notary Public.

2. Oath of Administrator of Estate, notarized on May 3, 1951, bearing the signatures of Frederic Donhauser, Administrator, and Cornelius P. Coughlan, Notary Public.

3. Petition for Leave to Sell Personal Property, dated October 30, 1951, bearing the signature of C. P. Coughlan, Attorney in Fact.

4. First and Final Account and Report of Administrator and Petition for Order Settling Account, for Distribution, Decreeing Heirs, and Closing the Estate, filed January 12, 1952, bearing the signatures of Frederic Donhauser, Administrator, and C. P. Coughlan, Attorney for Administrator.

These documents are needed to send to Washington, D. C., for use in connection with a deposition to be taken on written interrogatories to be used in this matter. All of said items will be used by the Government in connection with this disbarment proceeding.

Dated at Fairbanks, Alaska, this 28th day of January, 1955.

/s/ THEODORE F. STEVENS,  
United States Attorney.

[Endorsed]: Filed January 28, 1955.

---

[Title of District Court and Cause.]

### ORDER FOR RELEASE OF DOCUMENTS

Upon Motion of the United States Attorney herein, it is hereby ordered that the Honorable LaDessa Nordale, United States Commissioner and Probate Judge for the Fairbanks Precinct, Fourth Judicial Division, District of Alaska, may and shall release to the United States Attorney for use in a deposition to be taken in Washington, D. C., in connection with this proceeding, the following documents from Probate File No. 1416, being the Estate of Raymond Silver, Deceased:

1. Petition for appointment of Administrator of Deceased's Estate, notarized April 20, 1951, bearing the signatures of "Frederic Donhauser," Petitioner, and Cornelius P. Coughlan, Attorney for Petitioner, and Cornelius P. Coughlan, Notary Public.

2. Oath of Administrator of Estate, notarized on May 3, 1951, bearing the signatures of Frederic Donhauser, Administrator, and Cornelius P. Coughlan, Notary Public.



3. Petition for Leave to Sell Personal Property, dated October 30, 1951, bearing the signature of C. P. Coughlan, Attorney in Fact.

4. First and Final Account and Report of Administrator and Petition for Order Settling Account, for Distribution, Decreeing Heirs, and Closing the Estate, filed January 12, 1952, bearing the signatures of Frederic Donhauser, Administrator, and C. P. Coughlan, Attorney for Administrator.

It is further ordered that the United States Attorney shall return said documents to said United States Commissioner upon completion of these proceedings.

Dated at Fairbanks, Alaska, this 28th day of January, 1955.

/s/ VERNON D. FORBES,  
District Judge.

[Endorsed]: Filed and entered January 28, 1955.

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[Title of District Court and Cause.]

### MOTION

Comes Now the Respondent, above named, and respectfully Moves this honorable Court as follows, to wit:

#### I.

To dismiss or strike the Information filed herein for the reason that the same is barred by reason of a judgment having been obtained in a previous

cause before this Court between the same parties respecting the same subject matter.

## II.

To strike or dismiss the Amended Information herein for the reason that it states a new cause of action entirely separate and distinct from the original Information on file herein, contrary to rule and law in such cases made and provided.

## III.

To dismiss or strike the entire cause for the reason that the Court has no jurisdiction herein as the result of the cause being statutory, with the subject statute authorizing the same having been repealed.

## IV.

To dismiss or strike the Amended Information for the reason that the right to maintain such a cause has been estopped by laches.

Done this 30th day of January, 1955, at Anchorage, Alaska.

/s/ C. P. COUGHLIN.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 31, 1955.

---

[Title of District Court and Cause.]

## NOTICE OF HEARING

To Cornelius P. Coughlin, Above Named:

You Will Please Take Notice that the motion to dismiss will be called on for hearing in the court

room of the above-entitled Court at Fairbanks, Alaska, on the 3rd day of February, 1955, at the hour of 10:00 o'clock, a.m., on said day, or as soon thereafter as counsel can be heard.

Dated at Fairbanks, Alaska, this 31st day of January, 1955.

/s/ THEODORE F. STEVENS,  
United States Attorney.

[Endorsed]: Filed January 31, 1955.

---

[Title of District Court and Cause.]

### ORDER

The Government was represented by Theodore F. Stevens, United States Attorney; the Respondent was present and represented himself.

Respective counsel had argument on the matter as to whether the Motion to Dismiss was properly filed in the conformity with a previous agreement of respective counsel in re the filing of his Answer by Respondent.

Recess to 11:00 a.m.

11:00 A.M.

Came the respective counsel as heretofore. Respective counsel presented argument on the motion to dismiss or to strike the amended Information in

this cause and the Government's motion to strike the Respondent's motion.

It was Ordered that the motion of the Government to strike the motion of the Respondent be granted.

The Respondent stated to the Court that he desired his Motion to Dismiss and to strike to be considered as his Answer.

Mr. Stevens resisted this procedure and presented argument.

The Respondent stated that he would file his Verified Answer today.

Entered February 3, 1955.

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[Title of District Court and Cause.]

## ANSWER

Comes Now the Respondent, above named, and for Answer to the Information on file herein against him states, alleges, admits, denies and qualifies as follows, to wit:

### I.

Denies all of the material allegations contained in the various Counts of the Information to the effect that Respondent has committed the dishonest acts alleged contrary to the provisions of Section 35-2-71 (6) of the Alaska Compiled Laws Annotated, 1949, and alleges that Respondent should not be disbarred.

Wherefore, Respondent prays that the Information be declared by judgment of this Court to be unwanton and confirm that the said Respondent is a member of the bar of this Court in good standing.

### First Affirmative Defense

Comes Now the Respondent above named and for a First Affirmative Defense alleges as follows, to wit:

#### I.

That this action is barred and under abatement by reason of the judgment had and obtained between the same parties concerning the same subject matter in Cause No. 7462 before this Court, the Court having no further jurisdiction.

Wherefore, Respondent prays that this Court render Judgment in his favor decreeing the Information filed herein to be barred and abated.

### Second Affirmative Defense

Comes Now the Respondent above named and for a Second Affirmative Defense alleges as follows, to wit:

#### I.

That the Amended Information herein is barred and abated and should be struck for the reason that the rules of equity prevent the amendment of a bill so that a new cause of action; such an amendment having been allowed the Court has no further jurisdiction in the matter.

Wherefore, Respondent prays that this Court

render Judgment in his favor decreeing the Information filed herein to be barred and abated.

### Third Affirmative Defense

Comes Now the Respondent above named and for a Third Affirmative Defense alleges as follows, to wit:

#### I.

That this matter is brought before this Court upon statutory grounds, the statute authorizing the same having been repealed; hence, the Court has no jurisdiction in the matter.

Wherefore, Respondent prays that this Court enter Judgment in his favor decreeing the Amended Information to be barred and abated.

### Fourth Affirmative Defense

Comes Now the Respondent above named and for a Fourth Affirmative Defense alleges as follows, to wit:

#### I.

That the Relator is estopped from prosecuting this cause by reason of laches.

Wherefore, Respondent prays that this Court enter Judgment dismissing the Amended Information with prejudice.

Dated this 3rd day of February, 1955.

/s/ C. P. COUGHLAN.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed February 3, 1955.

[Title of District Court and Cause.]

### STIPULATION

It Is Hereby Stipulated between Theodore F. Stevens, United States Attorney, and Cornelius P. Coughlan, pro se, that any notary public or other officer authorized by the laws of the District of Columbia to administer oaths may take the deposition of Clarence E. Bohn in Washington, D. C., on the written interrogatories and cross-interrogatories propounded by the parties herein.

Dated at Fairbanks, Alaska, this 5th day of February, 1955.

/s/ THEODORE F. STEVENS,  
United States Attorney.

/s/ C. P. COUGHLAN.

[Endorsed]: Filed February 5, 1955.

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[Title of District Court and Cause.]

### ORDER

The Government was represented by Theodore F. Stevens, United States Attorney; the Respondent was present and represented himself.

The Court having on February 2, 1955, rendered a decision against the Respondent in this cause, in cause No. 8267, entitled C. P. Coughlan vs. Theodore F. Stevens, and, in view of this opinion, feeling that the aforesaid respondent may feel that this Court

might be prejudiced in the matters in this cause, it was Ordered that the record show that the Court disqualified itself for the trial of this cause, the trial date to be continued generally.

Entered February 7, 1955.

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[Title of District Court and Cause.]

### ORDER SETTING

The Government was represented by Theodore F. Stevens, United States Attorney; the Respondent was present in person and represented himself.

On the Motion of Mr. Stevens, Mr. Coughlan consenting thereto, it was Ordered that the trial of this cause be set for 10:00 a.m., Monday, February 28, 1955.

Entered February 7, 1955.

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[Title of District Court and Cause.]

### MOTION

Comes Now the Respondent above named and respectfully moves this Court to extend the time set for the hearing herein, and reset this matter for hearing to be held at 10:00 a.m. on the 10th day of March, 1955, and for reason, therefore, states as follows, to wit:



## I.

That the respondent has recently discovered evidence indicating that expert testimony may be available within the next ten (10) days which will not only objectively prove that the Respondent was not guilty of any dishonesty as charged in the Information herein, but will objectively prove the person who did in fact perform the said dishonest act, if any has been committed. That the aforesaid proof will be derived from the Inventory found in Probate Court, Fairbanks Precinct, Fourth Division, Territory of Alaska, and contained in the files and records kept in the Matter of the Estate of Raymond Silver, Deceased, which has been altered and tampered with.

And for the Further Reason :

## II.

That the Respondent had previously engaged Anchorage counsel to represent him in the hearing of this matter, but that it has been recently discovered that said Anchorage counsel has engaged in a political controversy, and otherwise publicly indicated that he was opposed to and disrespectful of the qualifications of the Honorable District Judge Folta, who will preside at the hearing of this matter. Consequently this Respondent has found it expedient and necessary to seek new counsel to represent him in this matter; and, if given sufficient time to do so, will engage a member of the Juneau firm of Faulkner-Banfield & Boochever to represent him in the trial of this matter.

This Motion is based upon the affidavit hereunto attached, all of the files and records contained in this cause, and upon every other matter appearing to or otherwise within the cognizance of the Court.

Dated at Fairbanks, Alaska, this 23rd day of February, 1955.

/s/ C. P. COUGHLAN,  
Respondent.

### Affidavit

United States of America,  
Territory of Alaska—ss.

I, Cornelius P. Coughlan, being first duly sworn, on oath, depose and say as follows, to wit:

That I am the Respondent in the above-entitled action.

That in the course of preparing for the trial of this matter I engaged one Luke S. May, a nationally-recognized criminologist residing at Seattle, State of Washington, for the purpose of examining the writings that will be placed in evidence at the trial of this cause; and that as a result of the expert testimony of the aforesaid Luke S. May it is expected that the Respondent will be in a position to produce objective proof that he did not commit the dishonest act charged and possibly objectively show who committed the dishonest act, if, indeed, one had been committed. That the testimony of the said Luke S. May shall be based upon recently discovered

evidence that the original Inventory in the Matter of the Estate of Raymond Silver, Deceased, found in the records of the Probate Court at Fairbanks, Alaska, had been tampered with and altered for the purpose making it appear that affiant had committed a dishonest act.

That there has been political friction of a political nature existing in recent days between the Anchorage Bar and the Honorable District Judge Folta, with which the Affiant is unacquainted and does not care to become enmeshed, which makes it necessary for Affiant to terminate arrangements with Anchorage counsel to assist him in the preparation of his defense in this matter and secure instead Juneau counsel who will not possibly seek to personally affront the Court for political motives at the Court's and Affiant's personal expense.

Further Affiant Sayeth Not.

Dated at Fairbanks, Alaska, this 23rd day of February, 1955.

/s/ CORNELIUS P. COUGHLAN.

Subscribed and Sworn to Before me this 23rd day of February, 1955.

[Seal]      /s/ JOHN B. HALL,  
Clerk of Court.

Receipt of copy acknowledged.

[Endorsed]: Filed February 23, 1955.

[Title of District Court and Cause.]

### STIPULATION

It Is Hereby Stipulated and Agreed by and between Theodore F. Stevens, United States Attorney, and Cornelius P. Coughlan that the time for the hearing in the above-entitled matter be extended to the 17th day of March, 1955, at 10:00 a.m.

Done at Fairbanks, Alaska, this 25th day of February, 1955.

/s/ THEODORE F. STEVENS,  
U. S. Attorney.

/s/ C. P. COUGHLAN.

[Endorsed]: Filed February 26, 1955.

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[Title of District Court and Cause.]

### RECEIPT

Receipt of a copy of the Deposition of Clarence E. Bohn, in the above-entitled cause, is hereby acknowledged this 16th day of March, 1955.

/s/ C. P. COUGHLAN.

[Endorsed]: Filed March 16, 1955.

[Title of District Court and Cause.]

### ORDER RESETTING HEARING

Came Theodore F. Stevens, United States Attorney, and George M. Yeager, Assistant United States Attorney, representing the Petitioner; came C. P. Coughlan, the Respondent, representing himself.

Respective counsel stated that he was ready to go to trial.

The Court interrogated the respective counsel regarding the resetting of the trial of this cause.

Respective counsel orally stipulated that the trial of this cause be reset to follow the trial presently being had, No. 1985 Cr., United States of America vs. Douglas Joslyn.

Entered March 17, 1955.

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[Title of District Court and Cause.]

### TRIAL BY COURT

March 21, 1955

The Honorable George W. Folta, District Judge for the Third Division, present and presiding. The Petitioner was represented by Theodore F. Stevens, United States Attorney, and Philip W. Morgan, Assistant United States Attorney; the Respondent was present and represented himself in these proceedings.

Respective counsel presented opening statements to the Court.

Cornelius P. Coughlan was duly sworn as a witness for the Petitioner.

After direct examination by Mr. Stevens, the Court granted his permission for the Respondent to make statements to the Court regarding certain Identifications.

Came the respective counsel as heretofore; came the Respondent as heretofore, and the trial of this cause was resumed.

LaDessa Nordale was duly sworn and testified for the Petitioner.

The trial of this cause was continued until 9:30 a.m., Tuesday, March 22, 1955.

March 22, 1955

Came the respective counsel as heretofore; came the Respondent in person.

William M. Cartwright, Myrtle Bowers, Frederic Donhauser, and Ernest M. Hufford were duly sworn and testified for the Petitioner.

Recess to 1:30 p.m.

1:30 P.M.

Ernest M. Hufford, previously sworn, testified further in behalf of the Petitioner.

The Petitioner rested.

Robert Byers, Cyril Randell and George M. Sullivan were duly sworn and testified for the Respondent.

The Respondent, previously sworn, testified in his own behalf.

The Respondent rested.

Ernest M. Hufford, previously sworn, testified further for the Petitioner.

Both parties rested.

Respective counsel presented argument to the Court.

The Court took the matter under advisement.

March 23, 1955

Came the respective counsel as heretofore; came the Respondent in person.

The Court, Judge George W. Folta, presiding, having taken the matter under advisement on Tuesday, March 22, 1955, and now being fully advised in the premises, found that the Respondent had embezzled the sum of \$3,950.00 from the Silver Estate and that the testimony of the Respondent in regard to certain signatures on checks was false; that the defendant was an unfit person to practice law and is dishonest and should be disbarred, and directed that Findings of Fact and Conclusions of Law and Judgment be drawn accordingly.

It was further Ordered that the Respondent be suspended from practicing law pending the filing of the Judgment.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court having considered the evidence submitted by Theodore F. Stevens, United States Attorney as Petitioner, and Cornelius P. Coughlan, pro se, Respondent, and being advised in the premises, hereby, in conformity with Section 35-2-76 of the Alaska Compiled Laws Annotated, 1949, enters its Findings of Fact and Conclusions of Law.

### Findings of Fact

#### I.

That the Respondent, Cornelius P. Coughlan, has committed a dishonest act as alleged in Count I of the Amended Information herein, in that the said Cornelius P. Coughlan, as the attorney for the Estate of Raymond Silver, deceased, converted to his own use the sum of Nine Hundred and Fifty Dollars (\$950.00), the same being the proceeds from a check received by Cornelius P. Coughlan from the Lomen Commercial Company in payment for an asset for said estate, said check having been cashed by Cornelius P. Coughlan on or about the third day of October, 1951.

#### II.

That the Respondent, Cornelius P. Coughlan, has committed a dishonest act as alleged in Count II of the Amended Information herein, in that the said



Cornelius P. Coughlan, as the attorney for the Estate of Raymond Silver, deceased, converted to his own use the sum of One Thousand Dollars (\$1,000.00), the same being the proceeds from a check received by Cornelius P. Coughlan, said check having been negotiated to the Bank of Fairbanks, Fairbanks, Alaska, and the proceeds thereof having been credited as follows: Six Hundred Dollars (\$600.00) to the personal loan account of Cornelius P. Coughlan with said bank and the remaining Four Hundred Dollars (\$400.00) having been deposited in the personal checking account of Cornelius P. Coughlan in said bank, on or about the 17th day of December, 1951.

### III.

That the Respondent, Cornelius P. Coughlan, has committed a dishonest act as alleged in Count III of the Amended Information herein, in that the said Cornelius P. Coughlan, as the Attorney for the Estate of Raymond Silver, deceased, converted to his own use the sum of One Thousand Dollars (\$1,000.00), the same being the proceeds from a check drawn upon the account of said estate, said check having been negotiated to the First National Bank of Fairbanks by Cornelius P. Coughlan having endorsed the same and deposited the proceeds thereof in his personal checking account in said bank on or about the 12th day of January, 1952.

### IV.

That the Respondent, Cornelius P. Coughlan, has committed a dishonest act as alleged in Count IV of

the Amended Information herein, in that the said Cornelius P. Coughlan, as the attorney for the Estate of Raymond Silver, deceased, converted to his own use the sum of One Thousand Dollars (\$1,000.00), the same being the proceeds from a check drawn upon the account of said estate, said check having been negotiated to the First National Bank of Fairbanks by Cornelius P. Coughlan having endorsed the same and deposited the proceeds thereof in his personal checking account in said bank on or about the 4th day of April, 1952.

## V.

That the testimony of the Respondent, Cornelius P. Coughlan, with reference to his signatures on the several exhibits submitted by the Petitioner as known handwriting standards, is false.

## VI.

That the testimony of the Respondent, because of his demeanor in Court and his testimony and statements to this Court, is entitled to no credence.

## Conclusions of Law

### I.

The provisions of Section 35-2-76, Alaska Compiled Laws Annotated, 1949, have required that this proceeding be according to the equity rules or as nearly in conformity therewith as possible. This Court is governed by the Federal Rules of Civil

Procedure but the above-cited provision of the Alaska Code is not in conflict with any of the provisions of the Federal Rules of Civil Procedure.

II.

The objections set forth by way of affirmative defenses are without merit.

III.

The Respondent, Cornelius P. Coughlan, is an unfit person to practice law and is dishonest.

IV.

The Respondent should be disbarred.

Done at Fairbanks, Alaska, this 23rd day of March, 1955.

/s/ GEORGE W. FOLTA,  
District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 23, 1955.

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[Title of District Court and Cause.]

ORDER

This Court having entered its Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed, that Cornelius P. Coughlan be, and he hereby is,

disbarred from practice as an attorney at law in the Territory of Alaska, from and after the entry of this order.

It Is Further Ordered, Adjudged and Decreed that Cornelius P. Coughlan shall not make application for reinstatement as an attorney at law unless said Cornelius P. Coughlan first demonstrates to this Court that he has, within six months from the entry of judgment herein, made full restitution, with interest, of the monies converted by him from the Estate of Raymond Silver, deceased, to the parties entitled to said restitution.

Done at Fairbanks, Alaska, this 23rd day of March, 1955.

/s/ GEORGE W. FOLTA,  
District Judge.

[Endorsed]: Filed and entered March 23, 1955.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that Cornelius P. Coughlan, Respondent-Appellant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on the 23rd day of March, 1955.

Dated this 24th day of March, 1955, at Fairbanks, Alaska.

/s/ CORNELIUS P. COUGHLAN,  
Respondent-Appellant.

Service of copy acknowledged.

[Endorsed]: Filed March 24, 1955.

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[Title of District Court and Cause.]

### MOTION

Comes Now the Respondent-Appellant, above named, and respectfully moves this Court as follows, to wit:

That the Court fix the amount required for a supersedeas bond in the appeal taken by Respondent-Appellant to the United States Court of Appeals, Ninth Circuit, from the Judgment entered against him in this cause; and

That the Court permit the securities for said supersedeas bond qualify therefor at Fairbanks, Alaska, before the District Judge regularly in attendance at such place.

Dated at Fairbanks, Alaska, this 24th day of March, 1955.

/s/ CORNELIUS P. COUGHLAN,  
Appellant-Respondent.

Receipt of copy acknowledged.

[Endorsed]: Filed March 24, 1955.

[Title of District Court and Cause.]

### NOTICE OF HEARING

U. S. Attorney,  
Fairbanks, Alaska.

Please take notice that the above-named Respondent-Appellant will bring on his Motion for fixing supersedeas bond on appeal at the hour of 9:00 a.m., March 29th, 1955, in the District Court Room, U. S. Court House, Fairbanks, Alaska.

/s/ CORNELIUS P. COUGHLAN,  
Respondent-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 24, 1955.

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In the District Court for the District of Alaska,  
Fourth Division

No. 7521

In the Matter of:

The Disbarment of CORNELIUS P. COUGHLAN,  
Attorney at Law.

### ORDER

Whereas, the Respondent-Appellant, after filing a Notice of Appeal, has filed a Motion for fixing a supersedeas bond in the above-entitled matter; and

Whereas, the District Judge normally holding Court in the Fourth Division of this District has disqualified himself in this cause;

Now, Therefore, It Is Hereby Ordered, That the Motion for fixing supersedeas bond on appeal be heard before the Honorable District Judge George Folta at the hour of 9:00 a.m., on the 29th day of March, 1955, in the District Court Room, United States Court House, Anchorage, Alaska.

Done this 25th day of March, 1955.

/s/ VERNON D. FORBES,  
District Judge.

[Endorsed]: Filed and entered March 25, 1955.

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[Title of District Court and Cause.]

### STATEMENT OF POINTS

The points upon which Appellant will rely on appeal are:

1. The court erred in permitting Petitioner to file an Amended Information stating a different cause of action;
2. The court erred in quashing Respondent's subpoena duces tecum and notice of taking deposition;
3. The court erred in failing to prescribe the rules applicable to this hearing, after being properly requested to do so;

4. The court erred in hearing this matter without giving Respondent sufficient time to secure his expert witnesses from Seattle, Washington, and counsel from Juneau, Alaska, after Respondent had just completed his closing arguments in a week-long criminal trial in which he had been appointed by the court to defend an indigent defendant;

5. The court erred in not properly conducting the hearing below in a fair, proper or impartial manner, which prejudicially deprived Respondent of a fair trial;

6. The court erred in permitting Petitioner to introduce into evidence and rely upon the transcript of record, Petitioner's Exhibit . . .;

7. The court erred in permitting the introduction of evidence previously properly subpoenaed and not produced;

8. The court erred in wrongfully, improperly, arbitrarily and prejudicially limiting Respondent in cross-examination;

9. The court erred in wrongfully, improperly, arbitrarily and prejudicially limiting Respondent's defense;

10. The court erred in refusing to allow Petitioner to introduce Petitioner's Identifications "A" to "T," inclusive, into evidence;

11. The court erred in finding that Respondent had committed a dishonest act as alleged in each count of the Amended Information.



Dated at Fairbanks, Alaska, this 25th day of March, 1955.

/s/ C. P. COUGHLAN,  
Respondent-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 25, 1955.

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In the District Court for the District of Alaska,  
Fourth Judicial Division

No. 7521

In the Matter of:

The Disbarment of CORNELIUS P. COUGHLAN

Theodore F. Stevens, United States Attorney, of Fairbanks, Alaska, attorney for petitioner.

Cornelius P. Coughlan, respondent, of Fairbanks, Alaska, pro se.

Be It Remembered, that upon the 30th day of December, 1954, the above-entitled cause came on for argument before the Honorable Vernon D. Forbes, District Judge.

The Court: The Court will now take up the case of, No. 7521.

Mr. Stevens: I believe, your Honor, that is Mr. Coughlan's motion on it.

Mr. Coughlan: That is correct.

The Court: That is correct, and you wish to present it, Mr. Coughlan, at this time?

Mr. Coughlan: Yes, your Honor. I presume that is the first motion that was filed, the motion for production of documents under Rule 34, Federal Rules of Civil Procedure. [1\*] I wish to state to the Court at this time that the respondent went to the City of Anchorage, Third Judicial Division, Territory of Alaska, for the purpose of obtaining expert services in preparation of his response in this matter and contacted one Don Cutter.

The Court: When was that trip, Mr. Coughlan? Excuse the interruption.

Mr. Coughlan: I believe that that trip was commenced on the 23rd, 23rd or 24th day of December, 1954.

The Court: Very well.

Mr. Coughlan: That the respondent returned to Fairbanks, Fourth Judicial Division, Territory of Alaska, with the expert witness for the purpose of examining and copying certain signatures; that at that time it was expected that Mr. Cutter would be able to remain in Fairbanks for a sufficient time to arrange his equipment and make preparations for taking the photographs; that in due course I attempted to contact Mr. Stevens concerning the matter for the reason that it was my belief that this matter had not been stipulated to in open Court fully on the previous day, that being the 22nd day of December, 1954, at which time the only articles mentioned were certain checks and exhibits appearing in Cause No. 1851 criminal before this Court. I was unable to contact Mr. Stevens and con-

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

tacted his Assistant, one George Yeager, and [2] explained the situation to him. Mr. Yeager was cognizant of the fact that Mr. Stevens, the United States Attorney for the Fourth Division, District of Alaska, had made some stipulation in regard to exhibits, but was unaware of any stipulation in regard to other matters which I agreed to be the fact. Therefore, I determined that it would be best to make a motion and procure an order from this Court in the absence of Mr. Stevens.

In the meantime, Mr. Cutter had to leave Fairbanks and will appear again at a later date in order to photograph these matters. Mr. Stevens called me last evening after regular office hours and informed me that he, of course, would have been perfectly willing to allow me to go ahead on that so it was just a case of it not having been taken up in Court before and so that there would be no misunderstanding in the absence of Mr. Stevens, I placed this motion.

Now, if the Court please, Mr. Stevens has agreed that these signatures or purported signatures of Mr. Donhauser may be photographed at any convenient time and he or one of his assistants should be present at that time. I think that that is sufficient under the circumstances. I brought that up only for those reasons that I have expressed here. There might have been some misunderstanding that Mr. Stevens had not stipulated in regard to those specific matters so in accordance with Mr. Stevens' stipulation I will pass that motion at this time. [3]

The Court: That is your stipulation, Mr. Stevens.

Mr. Stevens: That is my stipulation, Your Honor. However, I believe that I should inform Mr. Coughlan that in our discussion last evening I told him I would be perfectly willing to allow him to copy any of the signatures or for, or photograph any of the signatures of Mr. Donhauser which I had in my possession and I have gone through all the files in my office and the only documents I have which were signed by Mr. Donhauser are those which are in the file of the United States vs. Coughlan. I find I have many documents which purport to have been signed by Mr. Donhauser. Unfortunately, they are certified copies and they show only that there is the mark commonly put down by stenographers showing that it was signed by Mr. Donhauser. I would be glad to show those to Mr. Coughlan at any time, but I am afraid he will have to look further for those signatures. He thought we had some signatures of Mr. Donhauser including a bank record showing Mr. Donhauser's signature at the bank which to my knowledge we do not have.

Mr. Coughlan: Those things were in that file at one time. They might have been returned. In that case I would have to go further to procure them. They also had his college entrance application and college records with his signatures on them but, of course, they may very well have been returned some time ago. [4]

Mr. Stevens: I do not believe in any event there is a necessity for the order. Mr. Coughlan has

passed the order and I will agree to let him copy any signatures that we may have. He will have to rely upon my word, but I will go through the file to show him that we do not have them, if he wishes to do that.

The Court: Very well, it is understood at least. Now, we come to the motion of Mr. Coughlan for additional time in which to prepare his answer. Do you wish to be heard on that, Mr. Coughlan?

Mr. Coughlan: Yes, sir. As the Court knows, a discussion was held in open Court between the Court and the United States Attorney, Fourth Division, District of Alaska, on the 22nd day of December, 1954, in regard to the condition of the respondent in this case in respect to his ability to obtain local counsel. In accordance therewith the respondent journeyed to the City of Anchorage, Third Judicial Division, Territory of Alaska, for the purpose of obtaining counsel to assist him in preparing a defense or response to the information herein filed. The respondent contacted several attorneys of his knowledge in the City of Anchorage and because of their previous commitments and so forth, I was unable to procure the services of an attorney at this time.

I have requested the Court for an extension of time of approximately one month, to the 31st day of January, 1955, [5] during which time I should be able to obtain counsel and prepare my response. I don't believe that I can do it in any shorter time. I have borne in mind the Court's admonition that the Court did not care to see any unnecessary delay

of any kind whatsoever, that he wished to see this matter taken up as quickly as possible, and that I have stated in my affidavit and I state again that I honestly believe that that length of time is absolutely necessary for a preparation of this matter.

The Court: Mr. Coughlan, for the, to expedite matters I might make a statement. I am not trying to preclude you from making a full statement. You may go on as long as you wish, but I want to state at this time to Mr. Stevens that I am inclined to grant the extension of time unless there is some objection to it and good cause shown why Mr. Coughlan should not have up to and including the 31st day of January to reply, to answer.

Mr. Stevens: Your Honor, I believe as the Court does that this is a reasonable extension at this time. However, I call the Court's attention to the fact that following the 31st of January, we will become embroiled in civil trials, criminal trials and we would like to schedule this disbarment proceeding and to schedule it so we know when it will be and so we can subpoena our witnesses. Now, I am perfectly willing to agree with the Court and with Mr. Coughlan that he needs [6] until that date but I would like also to have an agreement with the Court and with Mr. Coughlan that the disbarment proceedings begin on a day certain. Now, a month to secure the services of an attorney and to have his handwriting expert make his analysis would seem a reasonable thing. He has shown that he is able to get a handwriting expert and he was up here and he will be available and it seems to me the 31st is on a Monday

in January, 1955, and that if Mr. Coughlan intends to file his answer by that time that we would like to have the Court's permission to make a day certain for the disbarment proceeding to begin and that would be the following Monday and I think that would give Mr. Coughlan a week after his answer to go ahead and prepare further. That would be five weeks from this coming Monday, actually would be six weeks, no, five weeks from this coming Monday, the 7th day of February, in 1955.

Mr. Coughlan: If it please the Court, I am perfectly amenable to that. The only thing I have in mind, I have nothing against that whatsoever, setting a day certain. The only matter that comes to my attention at this time is the attorney whom I procure or whose services I procure may have other commitments in another division. That is the only matter that I can think of here now. Now, I would be perfectly willing to stipulate at this time pro se that the United States Attorney set the matter on upon notification of the [7] attorney and if he has no previous commitments, actual commitments in a court of law there, that that be the way, the manner in which that be handled. Now, that date at this time, I would agree to have that marked at this time subject to that one thing only, that if the attorney is occupied in another Court then it would be rather obvious that he couldn't appear here if he had a prior commitment to a Court in his own division. That is the only thing I bear in mind and I don't say anything of that type will arise, but it might, so if Mr. Stevens has no objection to contacting the

person when I procure his services and tell him that that date has been marked by the Court, but I would like to, the Court to bear that in mind that I would hate to bind a man from another division who obviously has duties to that Court to any one date certain, absolutely, at this time. I would suggest if it is all right with the Court to mark that date and subject to foreign counsel or counsels from a separate division being able to appear at that time.

The Court: Well, I understand you have not retained anyone as yet?

Mr. Coughlan: I haven't been able to. A number of the attorneys were in Anchorage.

The Court: Can't you retain an attorney who will be available and able to——

Mr. Coughlan: In all probability I will, your Honor. [8] If he would be available to that particular day he would be available a day very close thereto. I am sure of that. No attorney is going to be that tied up on a calendar. I wish to state now, I am perfectly willing for a date to be set. I just wanted the Court to bear that one thing in mind.

The Court: The Court will grant Mr. Coughlan up to and including the 31st day of January in which to prepare and, prepare, serve and file his answer and we will fix the hearing or trial February 7, 1955, at ten o'clock in the forenoon. Is there anything further to consider?

Mr. Stevens: Not in connection with that case, your Honor.



United States of America,  
Territory of Alaska—ss.

I, Mary F. Templeton, official court reporter for the aforementioned Court, do hereby certify that the foregoing pages numbered 1 to 9, inclusive, constitute an accurate transcript of my original shorthand notes of that portion of the oral proceedings had upon the 30th day of December, 1954, in open Court in Cause No. 7521.

Dated at Fairbanks, Alaska, this 24th day of September, 1955.

/s/ MARY F. TEMPLETON. [9]

In the District Court for the District of Alaska,  
Fourth Judicial Division

No. 7521

In the Matter of  
The Disbarment of CORNELIUS P. COUGHLAN

Theodore F. Stevens, United States Attorney, of Fairbanks, Alaska, attorney for petitioner.

Cornelius P. Coughlan, respondent, of Fairbanks, Alaska, pro se.

Be It Remembered, that upon the 3rd day of February, 1955, the above-entitled cause came on for argument before the Honorable Vernon D. Forbes, District Judge:

The Court: In the case 7521, the Court observes in the file a motion on the part of C. P. Coughlan based on four grounds and, Mr. Coughlan, as I understand this proceeding is under the provisions of 35-2-72 of the following statutes and Section 35-2-75 provides answer, grounds of demur may be taken by answer only. The answer shall be in writing and verified as to pleadings in civil actions. I wonder how you interpret that, Mr. Coughlan?

Mr. Coughlan: Yes, your Honor, I would like to state [1\*] for the record that it has been held in this Court that all of the divisions of the District Court for the District of Alaska, are courts of the United States. Courts of the United States derive their jurisdiction and authority from the Constitution of the United States, which, I believe, the Court is aware, and the courts of the United States, including the District Court for the District of Alaska, are affected by Title 28, Section 2071, which specifies the rule making power of the courts of the United States in general.

Under Title 28, Section 2072, the rules of civil procedure are made applicable to the United States District Courts.

Under Title 48, United States Code, Section 103a, "Federal Rules of Civil Procedure applicable. The rules heretofore or hereafter promulgated and made effective by the Supreme Court of the United States under authority of section 2072 of Title 28, or under authority of any other statute, regulating the forms

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

of process, writs, and motions, and the pleadings, practice, and procedure, in actions of a civil nature in the district courts of the United States, and regulating appeals therefrom, shall apply to the District Court for the Territory of Alaska, and to appeals therefrom. June 6, 1900, c.786, ss 5a, as added July 18, 1949, c. 343, ss 1, 63 Stat. 445."

Title 48, United States Code, Section 80 reads, [2] "Legislature not to deprive judges, officers, etc., of district court of authority or jurisdiction. The legislature shall pass no law depriving the judges and officers of the district court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of district courts of the United States. Aug. 24, 1912, c.387, ss 3, 37 Stat. 512."

The aforesaid Section 2072, Title 28, reads, "Rules of civil procedure for district courts. The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States and of the District Court for the Territory of Alaska in civil actions."

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

"Such rules shall not take effect until they have been reported to Congress by the Chief Justice at the beginning of a regular session and until after the close of such session."

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken

effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. [3] June 25, 1948, c. 646, 62 Stat. 961, amended May 24, 194, c. 139, ss 103, 63 Stat. 104; July 18, 1949, c. 343, ss 2, 63 Stat. 446.”

Now, I believe the Court is well aware in this particular action is statutory, obviously passed by the legislature. What, then, is the, is the, and it provides for a particular rule. Therefore, your Honor, what is the authority of the Alaska Territorial Legislature? The Congress has delegated authority to the Alaska Territorial Legislature by ordinary acts, statutes of the United States.

Mr. Stevens: Pardon me, Mr. Coughlan. If the Court please, would the Court ask Mr. Coughlan to state for the record what book he is reading so we can check these citations?

Mr. Coughlan: This is merely my notes. I will give them to you if you want them.

Mr. Stevens: As the Court can, see, Mr. Coughlan has a book in his hand and I would like to have the citation if I may, sir.

Mr. Coughlan: This is a personal note book of mine. I will give it to him on this thing here. I mean, I am not trying to hide that or anything of that type. I thought every one was cognizant of these particular sections of the United States Code. They are not hidden. They have been promulgated for a long period of time. As far as interrupting my particular statement to the Court is concerned,

in order to elucidate [4] on the statutory availability of—

The Court: The reporter is taking this all down. You may proceed.

Mr. Coughlan: Of course, the Court recognizes such legislative enactments of this type that the Congress may withdraw its authority by the same type of act. An ordinary statute of the United States, ordinary enactment which they have done. They have clearly done here, when they made the Federal Rules of Civil Procedure applicable to this Court.

Nor, your Honor, under those particular circumstances alone there is authority for bringing this under a dismissal for the simple reason, or a motion to strike, for the simple reason that the Federal Rules of Civil Procedure provide for it. Anything to the contrary being repealed by specific act of the Congress of the United States, and I submit, your Honor, that that is an abridgement if it were allowed to stand, an abridgement of the rules, prerogatives and rights, etc., of this Court by an act of the Territorial Legislature that is specifically prohibited by law.

I believe to go further, that the Court understands that this is a, in the nature of a quo warranto proceeding, that specifically it is in the nature of equity by rules of that particular statute and I am sure that this Court is well aware of the rules pertaining to quo warranto; that the Court is also well aware of the rules pertaining to equity and that [5] under the circumstances, under these particular motions,

that they have traditionally and classically been allowed; and that is the answer to that particular part of the question.

As far as bringing this matter up at this time is concerned, as long as we are facing the referring to rules and jurisdiction of the Court in general, this Court is bound to be governed by some rules in this matter and they apparently are the Federal Rules of Civil Procedure. Now, Rule 6(b) of the Federal Rules of Civil Procedure provides for five days' notice upon a motion, notice of hearing upon a motion before it is set. Rule 5(e) provides for an additional three days if service is made by mail such as was the case here, your Honor.

Mr. Stevens: May it please the Court?

The Court: Mr. Stevens.

Mr. Stevens: We do not understand Mr. Coughlan's statement to the Court, particularly in view of Section 427 of the Alaska Compiled Laws which is an act of Congress appearing at 48 United States Code, Section 91. That section says nothing in Sections 21-24, 44, 45, 67-73, 74-90 and 145 of this title which is, which are the sections which preceded this section in the Alaska Code being sections passed by Congress and actually incorporated in the Alaska Code "shall be construed as to prevent the courts of Alaska from enforcing within their respective jurisdictions all laws passed by the legislature [6] within the power conferred upon it, the same as if such laws were passed by Congress, nor to prevent the legislature passing laws imposing additional duties, not inconsistent with the present duties of their

respective offices, upon the governor, marshals, deputy marshals, clerks of the district courts, and United States commissioners acting as justices of the peace, judges of probate courts, recorders, and coroners, and providing the necessary expenses of performing such duties.”

Now this Court enforces every day acts passed by the legislature of Alaska. The act before the Court today is the act which is Chapter 32 of the Session Laws of the Legislature of Alaska for 1941, and that appears, that act appears in the Alaska Code beginning at Section 35-2-71 and we are particularly concerned with Section 35-2-72 and in conformity with this law of Alaska, the court has ordered Mr. Coughlan to answer, and, too, that he would be heard by answer only in writing and verified as stated in the Code. And at a previous session the Court will remember that the Court entered an order which was consented to by both Mr. Coughlan and the government that he would file an answer by the 31st day of January, 1955, and that the hearing would continue on the 7th day of February, 1955. And that was assented to in open Court by Mr. Coughlan and he has now filed a motion contrary to his previous agreement with the government.

Now, we believe that the Code is specific. It gives a duty upon this Court which is not a duty to enforce an action [7] of a civil nature nor an action of a criminal nature. This is a quasi criminal action but it is also in a civil vein, and I call the Court's attention to Warner vs. State Bar which is one of the leading cases in California. It appears at 150

Pacific Second at Page 892 and on Page 893 the Court stated it has been repeatedly held, however, that disbarment proceedings are not governed by the rules of procedure governing civil or criminal litigation and in that case the Court held that the Code of civil procedure did not necessarily apply to a disbarment proceeding. And I call the Court's attention further to the fact that 35-2-76 of the Alaska Compiled Laws states specifically the hearing shall be according to the equity rules or as nearly in conformity therewith as possible; and the Court has great latitude in regard to a disbarment proceeding. This is an action wherein the Court is requested on behalf of the government to discipline a member of the bar and it is an action wherein the Court is actually hearing evidence concerning the actions of an officer of the Court and to determine whether or not that officer should be permitted to continue with his privilege of practicing law. We believe that the motion filed by Mr. Coughlan is out of order; it is contrary to the previous agreement entered into in open Court and that the same should be stricken even if the Federal Rules of Civil Procedure applied specifically to this action the legislature of Alaska has the authority to impose additional duties upon this Court and upon [8] parties before this Court: And this statute of the legislature of Alaska in 1941 goes further than any Federal rule of civil procedure because it states specifically that the grounds of demur may be taken by answer only. It is very specific. It goes further than any rule in



the Federal rules of civil procedure and we think that it is binding upon Mr. Coughlan.

We also state to the Court that we cannot understand how Mr. Coughlan could enter into the agreement with the Court and with the government and then escape the agreement and escape the provisions of the statute. We ask the Court to strike the answer, strike the motion and instruct Mr. Coughlan to answer forthwith and to inform Mr. Coughlan that the government has already subpoenaed witnesses to appear here on the 7th day of February, and we have every intention of continuing with the matter in accordance with the previous setting of this Court.

Thank you, your Honor.

The Court: I understand your position, Mr. Stevens, that you ask the Court to strike the motion. You therefore didn't comment upon the sufficiency or insufficiency of the notice of the hearing of the motion?

Mr. Stevens: The notice, your Honor, was filed in order to get Mr. Coughlan before this Court. I would call the Court's attention to the fact that Mr. Coughlan himself has not followed that rule in connection with a notice to the [9] government. He gave me notice to appear at one time on the following day, as I remember right, for a deposition. Maybe it was two days.

Mr. Coughlan: Your Honor, there is a different rule involved there. This is on motions only, Rule 6(d) and (e).

Mr. Stevens: The government's position is cate-

gorically that the Federal Rules of Civil Procedure could not, do not apply to this action. There is nothing in the Federal Rules of Civil Procedure that applies to disbarment at all; and the reason obviously is that the Federal Courts throughout the states do not handle disbarment proceedings on a matter of original jurisdiction. The attorneys before Federal rules courts in the states are members of the state bars before they may be admitted to practice before Federal courts. That does not apply to the District of Columbia or the Territory of Alaska. I call the Court's attention to the fact that Hawaii, as I am informed, the practitioners before the Court are members of the Hawaii bar. In the District of Columbia, I happen to be a member of that bar myself, and in order to be admitted to practice before the Municipal Courts of the District, one must be admitted to practice before the District Courts of the District of Columbia. There is a bar association, and there is an integrated bar is the word I am searching for. I believe that this proceeding is specific. It is not a civil action and it is not a criminal action. It is an action to [10] discipline, and it is specifically the disbarment or suspension section of the Alaska Code providing the means in which attorneys may be regulated by the Court, and I see no reason why we should have the Federal Rules of Civil Procedure entering into the situation, particularly when the statute states specifically that the equity rules apply and we have citations to show to the Court that that is a common provision in disbarment proceedings.

It is either the equity rules or the—in Arizona, for instance, the statute states specifically that the rules of evidence applicable to the Superior Court for Arizona shall be followed as far as practicable, provided that evidence may be admitted and considered which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. In other words, they say that the rules of practice before Arizona, apply, except that the Court may follow equity procedure. I believe that last sentence defines what is commonly known as equity procedure.

We do not consider that we are bound by any notice provisions in the Federal Rules of Civil Procedure. Also, Mr. Coughlan entered upon the scene; he appeared in answer to the motion and he raised his objections after he had appeared. I believe he had waived his privilege of refusing to answer, refusing to appear in answer to our notice, anyway.

The Court: This matter was before—— [11]

Mr. Coughlan: Your Honor, I answered those questions at the specific request of this Court. We have not entered into a motion or anything else to this point. The Court has merely been interrogating the attorneys. Now in that respect, I would like to make a few comments to the Court for the Court's own——

The Court: I think counsel is right, you were brought to your feet by a question of mine.

Mr. Coughlan: Yes, your Honor, very definitely, but your Honor, I would like to mention this; Mr. Stevens says we are not bound by the rules. What

rules is he bound by? What rules did he give notice under? Now, the Territorial statutes provides for much longer rules. He says you are bound by equity rules in here. What are the equity rules of this Court? What are the equity rules of this Court, your Honor? Only those provided by the Supreme Court of the United States and Act of Congress as provided for by the Constitution of the United States. Those are the only rules that are applicable here. Mr. Stevens says himself that this is a district form of action here. We don't find in other places, and yet he cites a California case which I admit is distinguished. It is very distinguished. It is an entirely different form of action. Entirely different.

Now, the question here at this time as I understand it, is raised by this Court, is coming into jurisdiction, and I [12] submit for the Court's own thinking in this matter that this is an action in the nature of quo warranto. I believe the Court is aware of that.

Number two, I believe that it is very evident that equity proceeding as a whole is going to apply here and it is equity rules of this Court. That is what is going to bind this Court. I believe that the Court is well aware that in this proceeding or any other special proceeding, rules must be followed in order to comply with the constitutional provisions in protecting the rights and immunities of the citizen regardless of whether he is a Court officer or not. Quo warranto, by the way, as Mr. Stevens pointed out, he says it is quasi criminal; at one time it was criminal. It is still criminal in form, very obviously so. The

statute here provides for an information. Now what information is there known to the common law? It certainly isn't defined in the statute. Therefore, it must be quo warranto since there is a provision as to civil rules. Quo warranto first arose in time immemorial. It has been known to the English law. It first appeared in the statutes in Edward the First. It was later abrogated in, I believe it was for William and Mary, and it has been known to the English law, under that section, through to the time of the passage of the judicial law. It is an ancient proceeding, your Honor. This isn't anything new. There is nothing mysterious [13] about it. One doesn't have to go to great lengths to determine, for instance in these particular matters brought to the Court's attention, that if an action is barred the Court has no jurisdiction. If an action is abated the Court has no jurisdiction. That has nothing to do with demur and as far as the Federal Rules of Civil Procedure are concerned, demur is done away with; you can't bring it up in an answer or any other way. It is done away with; but matters in disbarment and abatement going to the jurisdiction of the Court may be brought at any time. That is one of the most ancient rules of English law, and when they are that old, when they have been known for that length of time that their beginnings are not even recorded in the annals of the law, it would certainly be strange to have them warped at this time. Your Honor, I would submit a brief on this if the Court would want one.

The Court: The record shows that this matter

was last before the Court on December 30th. At that time both parties agreed that if the Court allowed additional time, respondent made a motion for additional time in which to answer the amended information. At that time the Court granted additional time and the respondent agreed, I believe the record will show that it was agreeable to him if he had until January 31st, 1955, in which to prepare, serve and file his answer.

Mr. Coughlan: Yes, sir, or otherwise plead, was it not, your Honor? [14]

The Court: And the hearing was at that time set by counsel for Monday, at ten o'clock, February 7, 1955. There is nothing in the, so far at least in the position of the respondent inconsistent with the previous agreement. He has not said that he does not intend to file his answer and be ready for trial on February 7, 1955, and I would like to clear up another matter, if I can at this time and that is whether or not the respondent at this time consents to or objects to the hearing of the motion. I didn't understand your position. You mentioned that you hadn't been served with a proper notice, but do you wish to go ahead with the hearing of the motion or do you, what is your position in that regard?

Mr. Coughlan: Well, I have more or less lost my train of thought here on account of the time involved, and so on and so forth. I have been out of town and I lost my train of thought here, but I notice that the Court has something set, what is it, a divorce this afternoon. Is that a divorce case this afternoon, your Honor?

The Court: It arose out of a divorce case.

Mr. Coughlan: It is prolonged?

The Court: Not, no, it won't be a long hearing. What do you have in mind, Mr. Coughlan?

Mr. Coughlan: What I wanted to say was this; I just wanted to get my agile facilities, agitated facilities, and I would be prepared. Even if I had a half-hour, I would be [15] prepared to come in on this.

The Court: I don't know what the program of the United States Attorney is but if we are going to adjourn this matter until this afternoon, I say if it is to be adjourned——

Mr. Coughlan: I am ready to go, your Honor, if I could have a little recess. More or less see where I stand here. You know what I mean, prepare myself a little bit. My mind has gone entirely off of what I was——

The Court: We will recess until 11:00 o'clock; satisfactory?

Mr. Coughlan: Yes, your Honor, that would be satisfactory.

The Court: Mr. Stevens, is that agreeable?

Mr. Stevens: We are at the call of the Court on this matter, your Honor.

The Clerk: Court is recessed until 11:00 o'clock.

(Thereupon, the Court took a recess until 11:00 o'clock, at which time it reconvened and the hearing on this matter was resumed.)

The Court: Counsel ready to proceed?

Mr. Coughlan: Ready, your Honor.

Mr. Stevens: Government is ready, your Honor.

The Court: The Court will be pleased to hear from you now, Mr. Coughlan, after the recess. [16]

Mr. Coughlan: If it please the Court, in the matter that is being called to the Court's attention and this cause arises out of a statutory enactment wherein the statute provides for the rules of equity be the rules binding upon this action. As this matter has come to the Court's attention on prior occasions and the point has been brought up constantly and the record is even now replete with reference to the various rules of equity, I would like for the record to call upon the Court at this time to see if the Court has an understanding of the rules of equity involved in this matter, whether they be the new rules as provided by the Federal Rules of Civil Procedure or the old Federal equity rules so that the argument now presented may be presented with some cognizance and allow the respondent to not mention the one that the Court feels is not applicable.

The Court: The Court has not ruled and does not rule at this time as to which rule shall be applicable to this proceeding.

Mr. Coughlan: Your Honor, at this time I would like to take up number one, my motion, the motion is to dismiss or strike the information filed herein for the reason that the same is barred by reason of a judgment having been obtained in a previous cause before this Court between same parties representing the same subject matter. [17]



In the records and files of the District Court for the District of Alaska, Fourth Division, this is found and contained an action entitled in the action Disbarment of Coughlan, Attorney at Law, 7462. A rather peremptory perusal of that particular cause of action will call the Court's attention and the Court may take judicial cognizance of the fact that there has been a dismissal therein. Under the particular rules of equity a dismissal in such an action bars any further action and that is so under either of the forms of rules applicable to this Court as the Court may deem fit to consider applicable herein hereafter. The former rules of equity before the Federal Courts made that absolutely the law and I am sure the Court is undoubtedly cognizant of the old rules of equity. That is also true in the new rules.

That, of course, brings up the question of abatement which the Court is indubitably cognizant of and, therefore, there is no need to mention it.

Number two of the motion to—does the Court wish me to run through these one right after the other?

The Court: That would be very well.

Mr. Coughlan: Two, to strike and dismiss the amended information herein for the reason that it calls, that it states a new cause of action entirely separate and distinct from the original information on file herein, contrary to rule and law in such cases made and provided. I would like to point to the [18] Court's attention that Chapter 72 of the Alaska Compiled Laws Annotated, Chapter 35 of the

Alaska Compiled Laws Annotated, 1949, does not make any provision for an amendment of an information. It is quiet thereon. A year ago the general provisions regarding the rules of equity must apply. I believe the Court is fully cognizant of the fact that under the rules of equity it is forbidden, absolutely forbidden, to amend a bill in equity so as to state a new cause of action. Under the rules now applicable in this Court, if the Court should now deem the Federal Rules of Civil Procedure applicable in this particular proceeding, said rules also prohibit such an amendment.

Paragraph three, dismiss or strike the entire cause for the reason that the Court has no jurisdiction herein as a result of the cause being statutory with the subject statute authorizing the same having been repealed. If the Court would take cognizance of the further argument that I made this morning in regard to the jurisdiction of this Court, I am not again going into the matter.

The Court: The Court will take cognizance of your previous argument.

Mr. Coughlan: And that will be included as a part of this argument on this motion?

The Court: Yes, Mr. Coughlan.

Mr. Coughlan: Paragraph four, or cause four here to [19] dismiss or strike the amended information for the reason that the right to maintain such a cause has been estopped by laches. I should like to refer to the Court the proposition that the rules of equity have since time immemorial recognized the subject of laches and I am sure that

the Court is cognizant of that fact and there is no need to take up the Court's time at this time by enunciating doctrines that are exceedingly well known.

Mr. Stevens: If it please the Court.

The Court: Mr. Stevens.

Mr. Stevens: I take it that Mr. Coughlan's first statement refers to the case which was filed by my predecessor, case No. 7462, filed in this Court and the order of dismissal filed by the Court, states that this respondent, Cornelius P. Coughlan, was on the 12th day of December, 1952, found guilty and convicted of four counts of embezzlement, a felony under the laws of the Territory of Alaska; that in reality the judgment of conviction of the above-named respondent was not entered until the 9th day of May, 1953; that the information filed in said cause was premature and the Court being fully advised in the premises it ordered that the cause be dismissed. Now, that is not a judgment on the merits. It is a dismissal due to a premature filing of a cause, certainly not a bar to further proceedings upon the part of the government under any rule that I am cognizant of. [20]

Now, as to Mr. Coughlan's second ground which states that this is a new cause of action entirely separate and distinct from the original information on file, I call your Honor's attention to the fact that this cause was originally filed under the law stating that Mr. Coughlan had been convicted of four counts of the crime of embezzlement and that he should be disbarred because he had violated his

oath, duties and obligations as an attorney at law and was guilty of unlawful misconduct in practice of the profession. It was stipulated that an amended information be filed, the stipulation being entered into by both Mr. Coughlan and T. N. Gore on the 25th day of June, 1953, and such amended information was filed. On that amended information, an amended order was filed that Mr. Coughlan answer the amended information and the Court at that time, on the 25th day of June, 1953, called Mr. Coughlan's attention to the fact that, you should note all grounds of demur should be taken by answer only and in the event you fail to so appear and answer, judgment for removal as attorney at law will be entered against you pursuant to the provisions of Sections 35271 to 35277 of the Alaska Compiled Laws. On the 2nd day of July, 1953, Mr. Coughlan filed a motion for extension of time in which to plead. That motion was never noticed on for hearing. It was received in our office on the 6th day of July, 1953. and at that time, as the Court is cognizant, or as the Court is aware, I believe, an appeal was [21] pending from Mr. Coughlan's former conviction in this Court on the felony charges. This matter was filed in this Court as an amended information following a reversal by the Ninth Circuit Court of Appeals of the conviction on technical ground, on two technical grounds. The merits of this case were not reviewed by the Ninth Circuit and it was decided that the counts should be amended, the information should be amended to include the substantive charges filed in the felony

indictment against Mr. Coughlan. We filed this amended information in this proceeding so that the record would be clear to show that the disbarment action had actually been continued at his request.

According to the Court's order he had failed to file an answer on the day set within ten days from the 25th day of June, 1953, and any time the order of disbarment could have been entered pursuant to that order. The Court saw fit to continue the matter on Mr. Coughlan's own motion. We have filed this amended information and, according to the laws of Alaska, have gone through every procedure which would be necessary if we had filed an original information. We gave Mr. Coughlan notice. We gave him ten days to file an answer upon the government. We have given him an extension of six weeks in which to further consider the matter. He has been fully informed all along and I call the Court's attention that pursuant to Section 35-2-73, leave of the Court is not required to file an original information and when a situation is presented such as this that the ground upon which the original [22] information was filed, namely, conviction of a felony, has been charged due to a reversal by a superior court that the government has merely followed the procedure of amending the information to state rather than the conviction of the felonies that the acts set forth in the indictment were in fact committed by Mr. Coughlan and that, therefore, he should be disbarred for those acts in themselves placing the burden on the government at this time to prove the acts as they were proved in the

criminal action. Now, in the case of Warner vs. State Bar, which I previously cited to this Court this morning, 150 Pacific Second, page 892. The same procedure was followed by the State of California. The defendant Warner had been tried three times; on the first trial the jury disagreed; on the second trial there was a judgment, a verdict of guilty and the judgment was reversed in the court of appeals. On the third, Mr. Warner was again convicted but the judgment was again reversed. Now, the State Bar instituted proceedings against him after his third conviction charging that he had been convicted of a felony. When this conviction was reversed, the notice to show cause was amended and I am quoting now from the decision at page 893, "after the conviction was reversed, the notice to show cause was amended to charge that the petitioner made the offer to McNeal with the intention of defrauding him. In other words, the information was changed to charge the substantive acts rather than to charge that the defendant Warner had been [23] convicted of a felony, and the Court held that it was permissible to go ahead and proceed against the petitioner in this case, Mr. Warner, and we believe we have followed the same procedure and offer the Court that case for precedent in this action.

Now, the acts charged in the former information, that Mr. Coughlan had been found guilty and convicted of four counts of embezzlement are the four counts charged in this amended information and those counts were formerly contained in an indict-

ment, cause 1651, before this Court and we believe there is no surprise. Mr. Coughlan has not been taken off, or caught off guard on this matter. We have given him ample time and the government rather than open a new file has merely filed an amended information, one which we needed no permission from the Court to file a new information for. We do not see that the second ground has any substance.

As to the third ground, I would call the Court's attention to the fact that Title 28, Section 2072 of the United States Code, states that the Supreme Court shall have the power to prescribe by general rules the forms of process, writs, pleadings and motions and the practice and procedure of the District Courts of the United States and of the District Court for the Territory of Alaska in civil actions. This is not, your Honor, a civil action. This is a disbarment proceeding pursuant to a specific statute of the Territory of Alaska. It [24] is an action which is entirely distinct from any other type of action which could be presented before this Court. I do not believe that it is really a quo warranto action because we are not questioning Mr. Coughlan's right to be an attorney. We are questioning whether or not when he acted as an attorney he acted in accordance with the standard set up by the Territory of Alaska.

Now, there are cases which have decided that the rules made by the Supreme Court in furtherance of Section 2072 of Title 28 have not enlarged the jurisdiction of this, any Court, nor may they en-

large the jurisdiction of the Court. They may not decrease the jurisdiction of this Court, either, your Honor. The Territory of Alaska has specifically conferred jurisdiction upon this Court to hear this type of an action. It has set forth specifically the rules which must be followed. It has set down the procedure which must be followed and we believe that the Federal rules of civil procedure cannot change that. At least the act of the Territory of Alaska setting up the disbarment proceeding is not in conflict with the Federal rules of civil procedure. It extends the jurisdiction of this Court. It extends the rule-making and procedural powers of this Court and tells the Court what rules it must follow and as such we believe that the third section which states that the Court has no jurisdiction of this cause because the subject is statutory and the statute has been repealed is of no weight. [25] As a matter of fact, the statute has not been repealed. Chapter 32 of the Session Laws of Alaska of 1941 is still in effect.

Now, as to the fourth count which states that we are barred by the laches, there are cases, and we would be prepared to give them to the Court, we have them ready for the disbarment proceeding, which state there is no statute of limitations nor laches which bars the government from proceeding against an attorney for disbarment and, further, this action has been pending since the 2nd day of July, 1953, specifically due to the request of the respondent who moved the Court for an extension of



time in which to plead. He has never answered the first amended information. He has never moved against it. It has been pending and we merely filed another amended information. He has now filed a motion against that and I believe the Court can check with the court reporter and will find that on the 30th day of December this Court ordered Mr. Coughlan to file an answer and serve the same upon the government by the 31st day of January, 1955; and the further order that the hearing would take place on the 7th day of February.

Now, Mr. Coughlan, by filing this motion, would seek to upset not only the Court's order but also the Court's order in regard to the answer but also the Court's order in regard to the setting of the disbarment proceedings if we must follow the Federal Rules of Civil Procedure and I am certain that that is not what was intended by the Federal Rules of [26] Civil Procedure nor by the legislature of the Territory of Alaska when it stated that the answer, and I am quoting from Section 35-2-73, the answer in this case, let's see, I am not quoting exactly, just a minute. It states upon the filing of the information the Court shall make an order requiring the accused to appear and answer the information within ten days after service upon him of a copy of the information and of the order unless for good cause further time is allowed. Now, in that section, following that section the Court granted Mr. Coughlan for good cause six weeks and we have now come within four or five days of the day set for the hearing and we believe that Mr. Coughlan has not followed the Court's order and

that the motion which is not in conformity with the Court's order should be stricken from the records and the motion thereby denied and that Mr. Coughlan be ordered to file his answer forthwith or that the Court shall proceed pursuant to Section 35-2-76 which states that upon a confession of guilt or refusal to answer the charge the Court shall proceed to judgment of removal or suspension. We believe that Mr. Coughlan has in effect refused to follow the order of the Court on three separate occasions. He has never complied with the Court's predecessor in office, the Honorable Judge Pratt, who ordered that he file an answer within ten days after the 25th day of June, 1953. He did not file an answer on the original matter which was cause No. 7462. In that case also Mr. Coughlan filed a motion [27] which was denied.

Mr. Coughlan: Just one moment, as long as you are making reference there, I believe that the reference will show that that motion was not denied. It was denied and when the Court discovered that he was in error it was changed.

Mr. Stevens: The records of my office show that the motion of Mr. Coughlan's case, the second case to quash and dismiss 7521, was denied upon the 5th day of June, 1953. The file further shows that following that decision Mr. Coughlan and Mr. Gore entered into a stipulation——

Mr. Coughlan: Are you referring, you said 7462 before?

Mr. Stevens: That's correct. There was one in 7462. There was another one in 7521.

Mr. Coughlan: In that case the Court took it under advisement at the District Attorney's request.

Mr. Stevens: Well, if I am in error, 7462, your Honor, the motion was made. Mr. Coughlan did not answer that order. He did not answer the original order of the Court although in this case although the motion to quash and dismiss was denied on June the 5th, he had a further order on the 25th day of June, 1953, to file his answer within ten days. He did not follow that order. He has had a further order of this Court to file his answer and the Court granted him an extension of time and no answer was filed on the 31st day of January, 1955. [28]

We believe that there has been no laches on the part of the government. We attempted to go ahead with this matter. Mr. Coughlan himself has been dilatory, has refused to follow the Court's order and to conform with the laws of Alaska and we ask again that the Court strike the motion or deny the same because even if the motion were permissible it has no sufficiency and further that the Court tell Mr. Coughlan that he should, and order Mr. Coughlan that he should answer forthwith because the day has passed upon which he should have filed an answer upon the government and the Court's order again I state that the stenographer has looked up the original notes on December 30th, 1954, and the Court stated that Mr. Coughlan should file and serve his answer upon the government and Mr. Coughlan agreed in open Court to that procedure.

Thank you, your Honor.

Mr. Coughlan: Your Honor, in reply to that, just

one little thing I would like to say for the record that Mr. Coughlan, the respondent herein, is and has been for some time through this whole history of actions and counteractions greatly confused and jeopardized in his ability to form an answer due to the fact that Mr. Coughlan is unaware of what rules he is to answer under. Now, I should like to call to the Court's attention as long as it has been brought up by the United States Attorney that this Court has previously recognized the rule of abatement and under that rule of abatement there [29] was a dismissal brought before this Court. I might state for the record and I could place Mr. Hall on the stand because I imagine that his memory is very good along that line, I was incarcerated in the Federal jail, Fairbanks, Alaska, and was not allowed, shall we say, egress, in order to obtain the proper materials to submit a written answer. I was brought into Court and I made an oral answer and as a result of that oral answer the Judge at first denied the answer; subsequently after thinking it over he stated to the Court here that he had looked in open Court, that he had looked up the law of abatement, that he was not previously aware of that the respondent was correct and that the information should be dismissed. It was after, it was thereafter dismissed to my knowledge. It was on the Court's own volition. I see by this record that the United States Attorney at that time, who apparently looked up the law on abatement, filed a motion for dismissal of his own volition. Now, I might bring to the Court's attention that this matter was

all brought up at that particular time; that the Court recognized that particular element and Mr. Stevens himself refers to Section 35-2-72, Alaska Compiled Laws Annotated, 1949, which is divided into numerous sections. Each one of those sections specifically stating a statutory ground separate and distinct for removal from the office of attorney at law. Each one of them is separate and distinct. They are enumerated by statute as being separate and distinct. [30]

The original information herein brought under, I believe it was Section 1, at any rate, it is the Section of 35-2-72, Alaska Compiled Laws Annotated, 1949, referring to conviction of a felony. Specifically referring to conviction of a felony. Now, I don't know what rules of equity we are following here but whatever rules they are as long as they are equity prohibit the filing of a new complaint stating a new cause of action. That is the one thing that I would like to impress upon the Court since the United States Attorney completely skirted that particular aspect of the question. The rest of it, I believe, was well stated for his side.

The Court: The Court at this time will grant the government's motion to strike the motion of the respondent, dated January 30, 1955, without prejudice, however, on the part of the respondent to urge any of the matters set forth therein in his answer. The Court doesn't know and it is likely that the defendant has prepared and is ready to serve and file his answer which was requested to be

filed by the 31st day of December. Do you have your answer prepared?

Mr. Coughlan: I have an answer, your Honor. However, I don't believe it is necessary under the Federal Rules of Civil Procedure which I believe this Court is bound by. The present motion herein constitutes an answer under the rule. Being mislabeled makes no difference. They are an answer. Therefore, it states the general denial of the [31] proposition.

The Court: Does counsel wish to rely on the motion as being an answer?

Mr. Coughlan: Well, I don't believe it is whether I wish to rely or not. I think it is the rule of the Court that makes it such. In other words, if it is, if it controverts the matters set out and it would certainly be in the form of an affirmative defense and based upon the general denial you are going to be placed, the burden is going to be placed upon the government to prove their case so if the Court, if that is amenable to the Court and the United States Attorney it is my understanding of the rules and the numerous cases referring thereto in the Federal Rules Decisions, I believe that there has been an answer here since the day that was previously prescribed by the Court.

The Court: Well, does Mr. Coughlan wish to have the motion construed as an answer?

Mr. Coughlan: An answer and a general denial, yes, your Honor.

The Court: And you wish to file no further answer?

Mr. Coughlan: No further answer, your Honor.

The Court: Mr. Stevens.

Mr. Stevens: I call the Court's attention to the fact that the order was that the answer shall be in writing and verified as pleadings in civil actions. This——

Mr. Coughlan: Rule 11 of the Federal Rules of Civil [32] Procedure, your Honor, do not require verifications before this Court.

Mr. Stevens: I believe if Mr. Coughlan would be patient and permit the government to continue, your Honor, this matter is before the Court under a specific statute. The Court has previously ordered Mr. Coughlan to answer in writing only and that the same should be verified as pleadings in civil actions and the Court may take special notice of that section because it says as pleadings in civil actions. This is not a civil action. There is a comparison there to civil actions. Now, if Mr. Coughlan wishes to appear and swear that he controverts and enters a general denial of this matter and the Court wishes to permit Mr. Coughlan to go ahead and proceed with the disbarment hearing I can see that no one is prejudiced thereby other than Mr. Coughlan himself because he has failed to get on record any facts which might be an answer or might provide grounds of demur in accordance with the statute. The motion he has filed is not verified according to law and I feel that he would have no standing in a higher Court to raise a question concerning the sufficiency of the action or the proceeding when he refuses to comply with the Court's order. For that reason we

do not object to his proceeding on February the 7th as scheduled with the hearing, the disbarment hearing, on the basis of the papers he has already filed. I must state to the Court, however, that it appears to me that his refusal [33] to answer the charge could well be interpreted by a higher Court to justify this Court in following the Section 35-2-76 and proceed to enter a judgment of removal. Now, if Mr. Coughlan wishes to protect the record in order to protect his own future, that is his business. We believe the government's case has been stated and that we are within our rights in stating them in the fashion that we have and we ask that the Court order that the disbarment hearing proceed on February the 7th and I state to the Court and to Mr. Coughlan that the government has already served the summons upon the witnesses who are to appear for the government in accordance and in reliance upon the Court's order that the hearing shall take place on February the 7th.

Thank you, your Honor.

Mr. Coughlan: Your Honor, I would like to make a statement for the record at this time; that the reason that the respondent has at this time referred to the Federal Rules of Civil Procedure in such cases made and provided by law on rule promulgated by the Supreme Court of the United States in order again to ascertain whether this Court is bound by the Federal Rules of Civil Procedure or not in this matter. Now, the Federal Rules of Civil Procedure in Rule 11 specifically states that the answers do not have to be verified. Now,



under those circumstances and in two previous cases that I know of in this Court in which there have been conflicting views upon that subject, I would like very much in order to make a [34] determination of my rights here and the jeopardy in which I am placing myself that the Court make a statement in regard to which rules we are going to follow. I really don't know. That has been the one thing on the numerous times that I have appeared before the Court here in this action and previous actions, I have constantly, constantly attempted to find out what rules we are bound by. I have been running around in circles, your Honor. I don't know where we stand, and not knowing where I stand I really can't, couldn't, I don't believe, be expected to make any kind of determination of whether I have to verify this or not. In other words, how can I, how can I decide that if I don't know what the Court is going to require. If the Court wishes to order me to verify then, of course, I will go, this is the old rules of Federal equity procedure. If the Court says no, then I automatically assume that this is going to be under the Federal Rules of Civil Procedure now applicable in this Court or if the Court so states that it will be equity rules formerly enforced in the Territory of Alaska. Somewhere along the line we are going to have to pick up some kind of a rule to go by before this Court. I just wish that to be in the record, that I have been absolutely at a loss and I don't know what to do.

The Court: What you say is in the record, Mr. Coughlan.

Mr. Stevens: If I may call the Court's attention again to the fact that the proceedings as set forth by the Alaska Code states that the answer to the information must be filed [35] in ten days. The Alaska Code specifically refers to disciplinary proceedings. This is in Section 35-27-2. The Code also states that the answer shall be verified as pleadings in civil actions. I do not believe that Mr. Coughlan has the, has adopted the correct procedure in demanding that the Court rule at this time on what rule is applicable to these proceedings because he is under a Court order to proceed in accordance with the Court's order. The time was extended so that he had more than ten days to answer regardless of whether the civil rules are applicable or not. It is the government's position that they are not applicable but I do not see that the point has actually come into issue at this time and the Court has granted our motion to strike because that motion of Mr. Coughlan's is not in accordance with the agreement entered into in open Court and the order of this Court based upon that agreement and we believe that any statement by the Court would be in effect a declaratory judgment as to what rules are applicable. Again I call the Court's attention to the fact that Mr. Coughlan has been reading from a brief filed in the Ninth Circuit Court of Appeals in an action which I have no knowledge of. It is not a private notebook as stated by Mr. Coughlan. It is a brief.

Mr. Coughlan: It is a private, private notes from which I have been reading certain matters that have

been brought up. Where they come from is of no concern.

Mr. Stevens: But the statements from that [36] brief, your Honor, have been to the effect that the Federal rules apply. I do not wish the Court to be misled by that brief. If I had the opposing brief I might read from it also and the Court would face the problem which is undoubtedly before the Ninth Circuit in another case, but we believe the demand to make the Court rule on this issue is premature at this time because, in any event, Mr. Coughlan's rights have been protected under both the Alaska Code and the Federal Rules of Civil Procedure to this date.

Thank you, your Honor.

The Court: The government has, I think, implied at least that the respondent has refused to answer. I don't understand his position as one of refusal. He has contended that his motion is adequate for an answer. If he wishes to rest on that that will be his decision.

Mr. Coughlan: Well, your Honor, does the Court believe that it would be better that a verified pleading be—here is the situation—

The Court: I want you to understand, Mr. Coughlan, so to try to clear up things one at a time that the Court struck your motion under the clear provisions of Section 35-2-75 which is, as I previously said, provides that the grounds of demur may be taken by answer only. The answer shall be in writing and verified as pleadings in civil actions and that should indicate to the respondent that this

proceeding is taken [37] under the Alaska Code and that is one of the provisions and that should be very clear.

Mr. Coughlan: Then, in that case, your Honor, I am going to take advantage of the opportunity to file an answer, verified and an answer in conformance with the equity provisions of the Alaska law.

The Court: And how much time, Mr. Coughlan?

Mr. Coughlan: I will file it today, your Honor.

The Court: Very well, you will be permitted to file it today.

Mr. Stevens: No objection, your Honor.

The Court: And the case will proceed to trial as originally set on Monday, February 7, 1955, at 10:00 o'clock unless for good cause shown at this time.

Mr. Stevens: Thank you, your Honor.

The Court: Is there anything further?

Mr. Stevens: Nothing further from the government.

The Court: Do you have anything further, Mr. Coughlan?

Mr. Coughlan: No, your Honor, I have not.

The Court: Very well. When is our next order of business, Mr. Hall. [38]

United States of America,  
Territory of Alaska—ss.

I, Mary F. Templeton, official court reporter for the aforementioned Court, do hereby certify that the foregoing pages, numbered 1 to 38, inclusive, con-

stitute an accurate transcript of my original shorthand notes of that portion of the oral proceedings had upon the 3rd day of February, 1955. in open Court in Cause No. 7521.

Dated at Fairbanks, Alaska, this 29th day of September, 1955.

/s/ MARY F. TEMPLETON. [39]

March 20 and 21, 1955

(Be It Remembered, that at 3:20 p.m., upon the 20th day of *May*, 1955, the trial of this cause, No. 7521, was begun, petitioner represented by counsel and respondent, pro se, the Honorable George W. Folta, District Judge, presiding.)

The Court: Do counsel wish to outline their cases.

Mr. Coughlan: Your Honor, I would like an opportunity to approach the bench for a moment. I have a statement to make that, I think I prefer to make at the bench. May I approach the bench, your Honor?

(Thereupon, the attorneys approached the bench and the following proceedings were had.)

Mr. Coughlan: If it please the Court. I have just finished a case which I didn't anticipate lasting this long. I don't have my records here and I would like to have a little time for the, if the Court would like to feel my head here, I am running a fever and I have been attending a Doctor here and the reason

why I have asked to approach the bench in this particular matter is this, I am having a rectal discharge of puss that apparently has originated from an automobile accident that I was in in September. I have been running this temperature and I would like to have the opportunity to go over to see the Doctor about it in a few moments. It has been quite embarrassing to me. This has been occurring and reoccurring. There is no way to prevent it through self-control or anything like that. It has been occurring and I, I have been running a rather high temperature. I think if the Court wishes to do [2\*] so I think he can feel my head and ascertain that fact.

The Court: Well, I am no doctor. I am not going to start doing anything like that.

Mr. Coughlan: I just offered the opportunity if you might wish to do so.

Mr. Stevens: I was informed Mr. Coughlan went to see the doctor at noon, your Honor. I don't know anything about the facts of the matter. I believe it would be discretionary with the Court and we would abide by the Court's decision.

Mr. Coughlan: I did go to see the doctor, I might add, at noon and I was supposed to come back at a later time here today.

The Court: I can't grant a continuance. I have a deadline to meet in Anchorage, litigants, witnesses, attorneys from the States. I assured them I would be there on the 24th. If you feel no better, of course, this evening, why, you can see a doctor,

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**\*Page numbering appearing at top of page of original Reporter's Transcript of Record.**

but I think we had better go on. There has been enough delay.

Mr. Coughlan: Yes; well, your Honor, might I have ten minutes to get my file?

The Court: You may have this file.

Mr. Coughlan: Beg your pardon?

The Court: You may have this file.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were then had.) [3]

The Court: Are counsel ready to outline their cases or do they want to proceed without making an outline?

Mr. Stevens: If it please the Court, I have just filed with the Clerk a small memorandum which sets forth the background of the case from the records and states the government's position on several of the issues raised by Mr. Coughlan in the past. This Court is not aware of the, some of the motions made by Mr. Coughlan. We are prepared to summarize the case.

The Court: Well, all I am inquiring is whether counsel wishes to make an outline of their cases. If so, now is the time to do it.

Mr. Stevens: Yes; we would prefer to do so.

The Court: Very well, you may make your outline of the case then.

Mr. Stevens: Your Honor, this is a continuation of a disbarment proceeding which was originally set forth or instituted in 1953 by a predecessor in my office. The disbarment at that time was filed on the

specific ground that Mr. Coughlan had been convicted of a felony, actually of four felonies, in four counts of an indictment before this Court. That disbarment proceeding was continued at Mr. Coughlan's request pending the appeal to the Circuit Court of Appeals of the criminal case.

The criminal case was reversed by the Court of Appeals on four technical grounds. We have amended our [4] information in this case to set forth the four substantive offenses which Mr. Coughlan was alleged to have committed in the indictment before this Court in the criminal case. The government is of the opinion that the parties before this Court are the same and that the issues before this Court are the same and that there is ample precedent for the position that the record of the criminal case is admissible before this Court and that we shall request the Court to admit the portions of the record which are pertinent to establish the four offenses we have set forth in our amended information. We believe that this disbarment case is not an adversary proceeding, that it is not a criminal trial nor is it a civil trial. This is *sui generis*; that the court is acting through its inherent power and also under the statutes of the Territory of Alaska to discipline this attorney for the charges brought against him, if the Court finds that the offenses were in fact committed.

If the Court would examine the record it would, your Honor will see that a stipulation was entered into between Mr. Coughlan and myself that the deposition of a handwriting expert from Washing-



ton, D. C., could be taken and the deposition has been taken and returned to the Court as an official document. We intend to offer that deposition as testimony to establish the government's position that Mr. Coughlan endorsed the checks in question, which were four checks drawn upon the account of the estate of Raymond Silver [5] which Mr. Coughlan was the, in which Mr. Coughlan was the attorney for the administrator. The government's position is that Mr. Coughlan, acting as the attorney for the administrator, was entrusted with several checks which were signed in blank by the administrator when he left to go to the States; that Mr. Coughlan used three of these checks, made them out in an amount of one thousand dollars and endorsed the checks payable, he endorsed three checks on the back thereof and presented them through normal channels into the banking channels and that he received the value for the checks.

The fourth check is a check in the amount of nine hundred fifty dollars from the Lomen Commercial Company in Nome which was payment for a truck which Mr. Coughlan asked special permission of the Commissioner to sell ahead of the final accounting and that that check also payable to Mr. Coughlan as attorney for the estate was cashed by him and that the total amount of three thousand, nine hundred fifty dollars was appropriated by Mr. Coughlan to his own use.

Mr. Coughlan has in the past argued that we must conform completely with the Federal Rules of Civil Procedure which the government has not done and

we have not done so because the Code says specifically that this proceeding shall be according to the equity rules or as nearly in conformity therewith as possible. We believe that as set forth in this memorandum that the equity rules referred to are the equity rules set forth in our Code; that the Federal Rules were adopted in [6] 1948 and not applicable until 1949. They were in effect when the Territorial Legislature passed this bar act and were not referred to specifically. They were not applicable in the Territory of Alaska and we do not believe they are applicable to this situation by inference specifically due to the fact that they were not adopted until the Act of July 18, 1949, and it was held in *United States v. Twelve Ermine Skins*, that the case in the Third Division in 1948, that the rules were not applicable to the Territory of Alaska prior to their adoption formally.

Mr. Coughlan has argued that this is a quo warranto proceeding and that we must thereby be limited. We have pointed out in this memorandum that quo warranto, that has been abolished and this is a case in which it might have been used prior to that act. However, we think that the disbarment and suspension provisions of our Code, Sections 35-2-71 to 35-2-77 of the Code of 1949 are very specific in setting forth the procedure which must be followed in this type of a proceeding and we intend to be governed thereby.

As far as the specific evidence to be presented to the Court, we have the two checks, two of the checks

in question are in our possession. Two of the checks which were checks in the amount of one thousand dollars were not recovered in the original form. Photostats of those checks were obtained from microfilm in the possession of the bank of Fairbanks. Those checks were presented here in Court during [7] the criminal trial and there was a lengthy cross-examination by Mr. Coughlan in person of the people who presented that evidence before the Court. The blow-ups or the photostats of the microfilm are before the Court. The originals were never recovered, your Honor. They were part of the files of the estate of Raymond Silver which was in Mr. Coughlan's possession and when the file was recovered only two of the checks were there. The other checks were traced through the bank account and microfilm recovered which showed the transactions and showed that the checks had been presented and endorsed in the same manner of which the one check we did recover. We did recover the nine hundred fifty dollars check, Nome, and one of the one thousand dollar checks. We do not have the other two original checks. We believe, however, that proof of the two checks which we do have would be sufficient to warrant this Court to disbar Cornelius Coughlan. The proof before the Court will consist of the testimony as we have said which has already been transcribed in connection with this case. We have a set of documents which we intend to establish as known handwriting standards of Cornelius P. Coughlan and the two checks which we have in the original form are the two

questioned documents which were passed upon by the F. B. I. in their handwriting analysis. The F. B. I. refused to pass upon the photostats stating that the photostats were insufficient for comparison purposes and they would make no comment with regard to the endorsements on those [8] two checks. That finding was transmitted to us this past week and we have not any handwriting analysis as to the endorsements appearing on the back of the photostats of the microfilm.

As I understand it, it would be impossible to obtain handwriting analysis of that type of evidence. However, the evidence in itself speaks for itself, your Honor, in that we shall show the record shows that the manner in which the money which was received for the checks was disposed of. It was placed into Mr. Coughlan's account, into his personal account and we believe that the evidence presented to the Court in the criminal case is sufficient to substantiate the charges here.

We have authority for our position in requesting the Court to consider this record and we also intend to request the Court to exercise its discretion to permit us to call Mr. Coughlan himself to the stand. We have cases starting with the landmark case of Arthur C. Vaughn in California——

The Court: You don't have to cite any authorities in support of a proposition of that type.

Mr. Stevens: We intend to follow that procedure, your Honor. That is the general background of the government's case and I cannot estimate at this time the length of time it will take, your Honor.

Mr. Coughlan: If it please the Court, in giving a resume of the pleadings and former actions prior to this date, [9] I should like to call the Court's attention to the fact that Cause No. 7462 was founded in this Court in the matter of the disbarment of Cornelius P. Coughlan, attorney at law. That proceeding was filed in May of 1953 and was dismissed. Thereafter, information was signed United States Attorney McNealy.

The Court: I am not interested in the history of this case. All I want to know is an outline of the, of your case as well as that of the United States.

Mr. Coughlan: Yes, your Honor, I wish to merely call one particular factor to the Court's attention in regard to rules. On May 19, 1953, Cause 7521 was thereafter filed which was also in the matter of the disbarment of Cornelius P. Coughlan. Thereafter, that Information was amended.

The Court: Well, you are still going into the history. I am not interested in what was amended. I am interested only in your defense.

Mr. Coughlan: All right, your Honor, maybe I can express it in a different way that I will bring the problem to the Court's mind. Your Honor, I have repeatedly requested of the Court prior to this time to state what rules are applicable in this proceeding. There has never been a statement from the bench as to what rules.

The Court: I am not interested in that, either. All you are required to do now is state what your defense is going to be and nothing else. You can argue the case at its [10] conclusion.

Mr. Coughlan: That is part of the defense, your Honor, that under our particular law regarding a disbarment action anything in the nature of a demur must be brought on at this time, must be brought on during this hearing. A demur may not be brought prior to that time by statutory enactment. It is prohibited. It must be brought up at the time of the hearing.

The Court: Well, you are discussing the law and I have already said several times that I am not interested in those aspects of the case. You have got to state your defense or we will proceed with the evidence.

Mr. Coughlan: Your Honor, in this particular case the government has already stated that they do not have evidence on two counts to substantiate two counts.

The Court: Well, I was wondering about the effect of that statement. I thought that all it amounted to was the original check was not available but that this was evidence of another kind sufficient to at least offer in support of the evidence.

Mr. Coughlan: Your Honor, to state it succinctly, my defense in this particular matter will be, number one, that I did not sign any checks that the government might produce as charged in the Information; Number two, that under our statute this proceeding has not been instituted and carried on in a proper manner. I would at this time, that is the sum [11] substance of my statement. I will cut it off at that. I would at this time request the Court

to state what rules we will be governed by here in the Court, in this proceeding.

The Court: Well, what are your present specific contentions? As I understand, do you contend what rules govern?

Mr. Coughlan: Your Honor, it is my contention at the time that the statute was first enacted the rules that were applicable to this type of proceeding were the rules of equity applicable in this Court, but since that time by specific Act of Congress those rules have been abrogated and I am sure that this Court is fully cognizant of the, of the abrogation that I am referring to, the institution of the Civil Rules of Federal Procedure in the District Court for the District of Alaska. I believe that the Court has been on the bench during all of the time that the new Civil Rules have been in effect in Alaska. That as a specific act of Congress those rules were by the terms of an Act of Congress made to supplant the former rules of equity and, therefore, the rules of equity that we will use in this proceeding will be those contained in the Federal Rules of Civil Procedure. And I wish to call the Court's attention to the fact that the Act of Congress making those rules——

The Court: All I want is your contention. Now, again, I have got to warn you not to argue the case, because I haven't got enough time. [12]

Mr. Coughlan: Yes; I just wanted to call that one thing to the Court's attention, that in that Act there is a specific repealing clause.

The Court: I am familiar with that. Besides the

Court is not going to pass on those things in advance. When the situation arises in this trial that calls for the application for one or the other set of rules as contended by the counsel here, why, then, I will make a ruling, but not before. All right, you may call your first witness or start putting on your evidence.

Mr. Stevens: I would like to call Mr. Coughlan, your Honor.

Mr. Coughlan: Your Honor, I refuse to take the stand at this time. The particular rules Mr. Stevens is referring to are rules for disbarment for states having commissions, what is referred to as integrated bar states, wherein a person is brought before a committee and a committee makes an examination at that time. Secondly, I will now bring to the Court's attention the rules of civil procedure, or of equitable procedure and I do not believe that under any of the rules of equitable procedure a case in equity may be proved by calling as a first witness the party against whom one is attempting to prove their case. There is a distinction in the type of disbarment actions, your Honor, between those where they allow that to be done and this type of proceeding.

The Court: Well, the objection is overruled. [13] You have to take the stand.



CORNELIUS P. COUGHLAN

the respondent, called as a witness on behalf of the petitioner, was duly sworn and testified as follows:

Mr. Coughlan: At this time, your Honor, I should like to state that I do not believe that I am required to answer questions in this matter and I do not think that I should be compelled to do so. Consequently, I will not do so during the proceeding unless the Court specifically instructs me to answer them. I wish to protect the record in that particular respect.

The Court: Go ahead.

Direct Examination

By Mr. Stevens:

Q. Would you state your name, please?

A. No; I will not state my name.

Q. On what ground do you refuse to state your name?

The Court: You will have to state your name.

Mr. Coughlan: My name is Cornelius P. Coughlan.

Q. (By Mr. Stevens): Where do you live, Mr. Coughlan?

A. Steele Hotel, Fairbanks, Alaska.

Q. Are you an attorney at law?

Mr. Coughlan: Your Honor, I am going to refuse to answer any further questions at this time.

The Court: You are ordered to answer this question. [14]

Mr. Coughlan: Yes, I am.

(Testimony of Cornelius P. Coughlan.)

Q. (By Mr. Stevens): Are you admitted to practice before this Court? A. I am.

Q. In connection with your practice as an attorney at law, were you the attorney for the estate of Raymond Silver, deceased, before the Commissioner's Court for the Fairbanks Precinct, Fourth Division?

A. I refuse to answer that question.

Q. On what ground do you refuse to answer that question?

A. I believe it is not a proper question in a disbarment action under our rules.

The Court: You are ordered to answer it.

Mr. Coughlan: I was.

Q. (By Mr. Stevens): Who hired you?

A. One Frederick Donhauser.

Q. And what was his position in regard to that estate?

A. He had no position in regard to the estate at the time he hired me.

Q. Did you obtain for him a position in regard to that estate? A. No; I did not.

Q. Did he ever attain a position in regard to that estate? A. I believe he did. [15]

Q. What was that position?

A. Administrator.

The Clerk: Petitioner's Identification No. 1.

(Bank of Fairbanks signature card was marked Petitioner's Identification No. 1.)

Q. (By Mr. Stevens): This is Petitioner's

(Testimony of Cornelius P. Coughlan.)

Identification No. 1, Mr. Coughlan. That Identification purports to be a signature card from the Bank of Fairbanks, Alaska; are you acquainted with that card?      A. No; I am not.

Q. Did you sign a signature card at the Bank of Fairbanks, Alaska, prior to the time you were appointed as attorney for the estate of Raymond Silver?      A. I believe I did.

Q. Is that your signature that appears thereon?      A. I don't think so.

The Clerk: Petitioner's Identification No. 2.

(Petition for Appointment of Administrator was marked Petitioner's Identification No. 2.)

Mr. Coughlan: I might state for the record that there is no "u" in the name Coughlan. It should be spelled C-o-u-g-h-l-a-n. It is not.

Q. (By Mr. Stevens): Where did you reside on April 12, 1952, if you recall? [16]

A. I believe I was residing at the Nordale Hotel upon that date.

Q. What was your occupation at that date?

A. Attorney at law.

Q. Do you ever sign checks other than with your given name?      A. C. P. Coughlan.

Q. Did you have a bank account at the Bank of Fairbanks during the year between April 12, 1951, and April 12, 1952?

A. I believe I did. May I see the Identification once more? Yes, I believe I had an account there at that time. I know I had an account at the Bank of

(Testimony of Cornelius P. Coughlan.)

Fairbanks. I am not, I cannot recollect when I opened it nor when it was closed.

Q. In connection with that account, did you sign a signature card as required by the Bank of Fairbanks?

A. I believe I did. I believe I signed one C. P. Coughlan at the time I opened the account. You see. I might state there that the First National Bank, I wrote my name out, Cornelius. At the other bank I merely used the initial "C."

Q. I hand you Petitioner's Identification No. 2, which purports to be a petition filed in the matter of the estate of Raymond Silver, deceased. Are you acquainted with that exhibit?

A. I have no specific recollection of the exhibit itself.

Q. Did you represent Mr. Donhauser in attempting to [17] become administrator for the estate?

A. I did.

Q. Did you file a petition in connection with that matter for the appointment of Mr. Donhauser as the administrator for the estate?

A. As I recall, I did.

Q. Would you examine the second page of that identification, please, Mr. Coughlan? Is that Identification signed by any attorney?

A. You mean, does it purport to be signed by any attorney?

Q. That's right, does it purport to be?

A. It purports to be signed by C. P. Coughlan, attorney for the petitioner.

(Testimony of Cornelius P. Coughlan.)

Q. Is the signature of Mr. Donhauser notarized on there?      A. It purports to be.

Q. Who was the notary in that case?

A. It purports to be Cornelius P. Coughlan.

Q. Is there a seal impressed upon the petition?

A. Yes, there is.

Q. And is that your seal, Cornelius P. Coughlan, Notary Public for the Territory?

A. I have a seal that bears that legend.

Q. Did you sign this document?

A. I don't recall ever signing that document with [18] that particular signature.

The Court: Is it your signature?

Mr. Coughlan: I don't believe it is, your Honor.

The Court: Why?

Mr. Coughlan: Because of the method in which the "P" is formed, the method in which the "h" is formed and the method in which the "n" is formed.

The Court: You honestly believe that is not your signature, is that correct?

Mr. Coughlan: Yes, your Honor, that is my testimony. I don't believe the other one is my signature either. The one appearing above the notary public in and for the Territory of Alaska. My Commission expires March 17, 1954. I might note that the "P" is different there, the "h" is also different even from the two signatures, considerably.

The Clerk: Petitioner's Identifications No. 3, No. 4, No. 5, No. 6, and No. 7.

(Oath of Administrator Frederick Donhauser, was marked Petitioner's Identification No. 3.)

(Testimony of Cornelius P. Coughlan.)

(Petition for leave to Sell Personal Property was marked Petitioner's Identification No. 4.)

(First and Final Account with regard to estate of Raymond Silver, deceased, was marked Petitioner's Identification No. 5.) [19]

(Check in the amount of \$117.29 was marked Petitioner's Identification No. 6.)

(Receipt signed by C. P. Coughlan was marked Petitioner's Identification No. 7.)

Q. (By Mr. Stevens): I hand you Petitioner's Identification 3 which purports to be a document filed in the same estate, the Matter of the Estate of Raymond Silver, deceased, before our Commissioner here in Fairbanks; do you recognize that document?

A. I have no independent recollection of the document.

Q. Were you the attorney for Mr. Donhauser?

A. On that particular date?

Q. In that particular case?

A. Yes; I was Mr. Donhauser's attorney prior to the time that he filed for letters of administration.

Q. Is your statement that you did not represent Mr. Donhauser after he received the letters of administration?

A. No. No. I meant I represented him after that date. From before the time that he applied for the Letters of Administration and thereafter up until the year 1952.

(Testimony of Cornelius P. Coughlan.)

Q. Does not Mr. Donhauser's, or what purports to be Mr. Donhauser's signature appear on that document, Identification No. 3?

A. There is a signature here that may be Mr. Donhauser's signature. [20]

Q. Does that signature purport to be notarized?

A. It purports to be notarized.

Q. And who was the notary in that case?

A. The notary purports to be Cornelius P. Coughlan.

Q. Is the seal impressed upon it?

A. There is a seal impressed upon it.

Q. Did you sign that document?

A. I do not believe I did. There again the "P" is formed differently than I form it. The "h" is formed differently and it is, they are formed, all of them are formed differently than they are in the others.

Q. Did you prepare an Oath of Administrator for Mr. Donhauser in connection with the estate of Raymond Silver?      A. I believe I did.

Q. Did you file the same with the Commissioner?

A. I believe I did. Not myself, personally, perhaps, but it was filed.

Q. I hand you Petitioner's Identification 4, which also purports to be an identification in connection with the same estate of Raymond Silver, a petition to sell personal property, I believe. Were you the attorney for Mr. Donhauser at the time that petition was filed?

(Testimony of Cornelius P. Coughlan.)

A. Yes; I believe I was.

Q. Did you present a petition for permission to sell personal property as listed in that petition?

A. I recall a petition for leave to sell personal property. [21]

Q. A truck?

A. I believe it was a truck located at Nome, Alaska.

Q. And that document purports to be signed by C. P. Coughlan, attorney in fact, is that not correct?

A. Yes; it purports to be signed C. P. Coughlan, attorney in fact.

Q. Did you sign that document?

A. I have no independent recollection of signing it and it does not look like my signature.

Q. Do you deny that is your signature?

A. Yes; I do. The "c's" aren't even the same in the words there.

Q. I hand you Government's Identification 5 which purports to be a final, first final accounting of the estate of Raymond Silver, deceased. Did you examine this identification, too, Mr. Coughlan?

A. I have examined it.

Q. This purports to be a petition for an order settling the account of the distribution and for the distribution of the estate between the heirs of the estate of Raymond Silver?

A. It purports to be first and final account and report of administrator and petition for order set-



(Testimony of Cornelius P. Coughlan.)

ting account for distribution, creating heirs and closing the estate.

Q. You will note that it has been signed C. P. Coughlan, attorney for administrator, and underneath appear the name, [22] C. P. Coughlan, attorney for administrator, Nordale Hotel, Fairbanks, Alaska. Did you sign that document?

A. I don't believe that I signed this document. The "p" is different than the way I make it and different from any of the others that have been shown here. The "h" is different and the two "c's" are different.

Q. Did you prepare such a petition on behalf of the administrator, Mr. Donhauser?

A. If I recall correctly there was a petition prepared but I do not believe that it was prepared at the time that this purports to have been prepared.

Q. The question is, did you prepare such a petition for Mr. Donhauser?

A. I did prepare such a petition for Mr. Donhauser, yes.

Q. But you deny you signed the document which is Identification 5?      A. That is correct.

Q. I hand you Identification 6 which purports to be a check on the First National Bank of Fairbanks, yes, the First National Bank of Fairbanks made payable to one Jack Coughlan. Have you ever been known as Jack Coughlan?

A. Yes; I have been and am presently known by the nickname of Jack.

Q. Did you work for Collins and Clasby, the law

(Testimony of Cornelius P. Coughlan.)

firm of Collins and Clasby in this town at any time?

A. Yes, I have. [23]

Q. Will you examine the reverse side of that document. You will notice endorsed by Jack Coughlan and Myrtle Bowers; is that your signature that appears thereon?

A. That may be my signature.

Q. Do you deny that it is your signature?

A. No; I don't deny that this is my signature, but I can't tell for sure whether it is or not.

Q. When were you working for Collins and Clasby? A. Oh, that was in 1950.

Q. When did you leave Collins and Clasby?

A. In 1950.

Q. Were you on payroll, that is, were you paid for your services there?

A. Yes; I was on the payroll to my recollection as C. P. Coughlan.

Q. I hand you Government's Identification 7, which purports to be a receipt and on the back thereof has a note, To Whom It May Concern. Have you seen that Identification previous to this time, Mr. Coughlan?

A. If my memory serves me correctly, I have.

Q. Did you write the note on the reverse side thereof? A. I believe I did.

Q. That is your writing?

A. I believe it was. I don't recall. I recall the receipt but I do not recall specifically writing this to somebody to pick up the money. That does not mean that I [24] didn't do it, but I don't recall it.

(Testimony of Cornelius P. Coughlan.)

I did at that time, approximately that time, 11-10, have some contact with Mr. Conrad Munsen.

Q. And were you also the attorney for Mr. Teddy Manville?

A. Yes; that is true, and I do recognize the receipt. I just don't happen to recall the specific instance when that was written.

Q. Have you examined the signature on that receipt of C. P. Coughlan? A. Yes.

Q. Is that your signature?

A. It appears to be.

Q. Petitioner's Identification——

The Clerk: Petitioner's Identification 8 (1) to (5). Petitioner's Identification No. 9.

(Five (5) checks were marked Petitioner's Identification No. 8 (1) through (5).)

(Check from Lomen Commercial Co., Nome, Alaska, in the amount of \$950.00 was marked Petitioner's Identification No. 9.)

Q. (By Mr. Stevens): Mr. Coughlan, I hand you Petitioner's Identification 8, which purports to be five checks drawn on the Bank of Fairbanks. Have you seen those checks before, Mr. Coughlan?

A. I saw them in December of 1952 at a criminal trial in which I was tried and subsequently through an action of [25] the United States Court of Appeals acquitted.

Q. Mr. Coughlan, the first check was payable to a J. P. Coughlan?

A. That is correct. It purports to be.

(Testimony of Cornelius P. Coughlan.)

Q. It is signed by one C. P. Coughlan?

A. I am unable to examine the signatures here with this attached the way it is. Yes, it purports to be endorsed J. P. Coughlan.

Q. And the second check is made out to C. P. Coughlan?

A. C. P. Coughlan, yes.

Q. The second check, Mr. Coughlan, is it made out to C. P. Coughlan?

A. It purports to be made out to C. P. Coughlan.

Q. By Mr. Donhauser?

A. No, as Frederick Donhauser, administrator of the estate of Raymond Silver, deceased.

Q. And what is the endorsement on the second check of that identification?

A. Endorsement on the back of that check purports to be C. P. Coughlan, I guess, or Coughlar, "n" or "r" on the end.

Q. The third check in that series also made out to C. P. Coughlan?

A. It purports to be.

Q. And endorsed on the back thereof by C. P. Coughlan?

A. It purports to be endorsed in the letters C. P. C-o-u-c-h-l-a-g or a-h at the end. [26]

Q. C. P. Coughlan, is that the endorsement on it?

A. That is what it purports to be.

Q. And the fourth check, is it made out in a similar manner?

A. It purports to on its face to be an order to pay C. P. Coughlan and purports to be endorsed in words and letters, C. P. Coughlan.

(Testimony of Cornelius P. Coughlan.)

Q. As to those first four checks, are those your signatures?

A. No, I do not believe they are.

Q. Do you deny they are your signatures?

A. I do not recognize them as mine and they don't look similar to mine, don't look like mine.

Q. The fifth check on that identification is a check in the amount of one thousand dollars payable to C. P. Coughlan, is it not?

A. It purports to be an order to pay C. P. Coughlan, C-o-u-g-h-l-a-n.

Q. And the amount is one thousand dollars?

A. That is correct.

Q. And it is signed by Mr. Donhauser as the administrator for the estate of Raymond Silver, deceased?

A. Frederick Donhauser, administrator of the estate of Raymond Silver, deceased.

Q. And the endorsement thereon?

A. Purports to be in the letters C. P. [27] C-o-u-g-h-l-a.

Q. Is that your signature, Mr. Coughlan?

A. I do not believe it is.

Q. Do you deny that it is your signature?

A. Yes, I do.

Q. In connection with the estate of Raymond Silver, were you entrusted with the funds in the Bank of Fairbanks which belonged to that estate?

A. No, they were deposited there by Mr. Donhauser.

Q. Did you at any time receive checks which had

(Testimony of Cornelius P. Coughlan.)

been signed by Mr. Donhauser as the administrator of the estate of Raymond Silver?

A. Yes, I have.

Q. Did you receive any checks which were signed in blank, that is, they were not filled in?

A. I can recall no such checks, no.

Q. Did you have a note due at the Bank of Fairbanks on—strike that, will you. A note which was pending in the Bank of Fairbanks which you owed to the Bank of Fairbanks during the month of December, 1951?

A. I don't recall. I did have a note which was with the Bank of Fairbanks, but I don't recall the date when I had it there.

The Clerk: Petitioner's Identifications No. 10 and No. 11.

(Photostat of check in the amount of \$1,000.00 was marked Petitioner's Identification No. 10.) [28]

(Photostat of check in the amount of \$1,000.00 was marked Petitioner's Identification No. 11.)

Q. (By Mr. Stevens): This is Petitioner's Identification 9, Mr. Coughlan. It purports to be a check in the amount of nine hundred fifty dollars payable to C. P. Coughlan, attorney, from the Lomen Commercial Company, of Nome, Alaska. Is the recitation that I made correct. Is that the type of check that you have in your hand?

A. The instrument that I have in my hand is

(Testimony of Cornelius P. Coughlan.)

an order to pay to C. P. Coughlan, attorney, made by Lomen Commercial Company, Nome, Alaska, against the main office of the Seattle First National Bank, Seattle, Washington.

Q. Is any endorsement on the reverse side thereof?

A. There appears to be an endorsement on the reverse side.

Q. What does it purport to be?

A. It contains the letters C. P. C-o., and it looks like maybe a-u, may not be, g-h-l-a. That is all the other, that is all the letters that appear there. Then underneath that there is the letters a-t-t-o-r-n-e-y.

Q. Did you handle the sale of a truck to the Lomen Commercial Company of Nome, Alaska, for the estate of Raymond Silver?

A. I do not recall precisely how the truck action [29] arose in regard to the Silver estate but to the best of my recollection a letter was received by the United States Commissioner from someone at the Lomen Company stating that they would like to purchase the truck belonging to the estate that was stored on their property. The United States Commissioner called me and told me that he had such a letter and we discussed the matter. We referred at the time to the inventory where it showed that the truck was valued, I believe at a little less than or approximately the same amount; that they wanted to pay for it and because of the fact that the truck was located at Nome where there

(Testimony of Cornelius P. Coughlan.)

was not a great demand for such equipment the Commissioner informed me that he thought it might not be a bad idea to sell it.

Q. Did you present the petition which is here in Court for permission to sell the truck for the estate?

A. No. Now, you see afterwards——

The Court: Just answer the question.

Mr. Coughlan: No. The answer is no.

Q. (By Mr. Stevens): You already stated that you did prepare such a petition?

A. I prepared a petition but not at that time.

Q. Did you receive a check from the Lomen Commercial Company of Nome, Alaska, in payment for a truck which the, the sale of which was authorized by the——

A. To the best of my recollection I received a check [30] in my office from the Lomen Commercial Company which was placed in the Silver file.

Q. What was the amount of that check?

A. I don't recall but I presume that it was this check that I have here. I do not recall specifically the sum of the check. I have no independent recollection of it, but it appears to be the same, same type of check.

Q. The endorsement on the rear of that check and the reverse side of the check purports to be Cornelius or C. P. Coughlan's signature; did you sign that check?



(Testimony of Cornelius P. Coughlan.)

A. No, I do not think I signed this check.

Q. Do you know whether you signed the check or not?

A. Well, yes, I know as well as I might know. The signature doesn't look like mine. It is not the way I sign my name.

Q. Do you deny you signed that check?

A. I do.

Q. I hand you Petitioner's Identification 10, which purports to be a photostat of microfilm of a check in the amount of one thousand dollars drawn on the account of Raymond Silver payable to C. P. Coughlan and endorsed on the reverse side by C. P. Coughlan. You have seen that photostat before, have you not?

A. I don't recall having seen this specific photostat before. However, I have seen the very similar one. Having examined it further on the inside I presume now that I have [31] seen this specific photostat before.

Q. You were present in Court at the time when microfilm from the Bank of Fairbanks was displayed to the Court previously?

A. I have no recollection of it, of the, no independent recollection of the checks or purported checks that might have been shown there if that is what you are referring to.

Q. Do you recall the actual showing of the microfilm before the court?

A. I recall they had a machine in here. I didn't watch it, no.

(Testimony of Cornelius P. Coughlan.)

Q. Were you the attorney for the estate of Raymond Silver on the date that that check bears, 1-2-52, I believe it is?

A. I can't tell what the date is either on this but if the, I believe that I was the attorney for the estate on 1-2-52.

Q. I hand you Petitioner's Identification 11, which purports to be another check in the amount of one thousand dollars payable to C. P. Coughlan drawn on the account of Raymond Silver, deceased in the Bank of Fairbanks, signed by Frederick Donhauser as the administrator and endorsed by C. P. Coughlan. Have you seen that identification before?

A. I believe I have seen this identification before although I have no specific independent recollection of it. It appears to be one that I have seen [32] before.

Q. Were you the attorney for Raymond Silver estate in March of 1952?

A. Yes, I believe I was.

Q. Do you know where the original of Identifications 10 or 11, which you have just examined, can be located?

A. No, I do not.

Q. Have you ever seen the originals of those checks?

A. Not to my recollection.

Q. Did you endorse Identifications 10 and 11?

A. I can't hardly make this one that I have in my hand, No. 11, out. It does not appear from what I can see of it, which is very, very little, to be my signature, the way the "C" and the "p" are cited.

(Testimony of Cornelius P. Coughlan.)

Q. Did you have an account in the First National Bank at the same time that you had a bank account in the Bank of Fairbanks?

A. Yes, I believe that I had more than one account in the First National Bank. I don't have specific recollection of it.

Q. Did you deposit this check in the amount of one thousand dollars in the First National Bank of Fairbanks to your account?

A. No, I have no recollection whatsoever of depositing that check to my account.

Q. Did you formerly have a notary public commission in the Territory of Alaska, Mr. Coughlan?

A. Yes, I have. [33]

Q. Did you have one in May of 1951?

A. Yes, I believe I did. I did in fact.

Q. Do you recall what date your commission expired on your former commission?

A. Off-hand I do not.

Q. Did you lose your notarial seal at any time?

A. I don't believe I did. I may have.

Q. In connection with the estate of Raymond Silver, deceased, did you have the amount of three thousand nine hundred fifty dollars coming to you for attorney's fees?

A. I have no recollection of what I would have had coming as attorney's fees in that estate.

Q. You have admitted, Mr. Coughlan, that the signature C. P. Coughlan's appearing on Petitioner's Identification 7, which is on the reverse

(Testimony of Cornelius P. Coughlan.)

side of a receipt issued by Sgt. DeSpair for bail in the amount of one hundred dollars on the case of Teddy Manville is in your handwriting; is that correct?

A. I do not specifically recall writing that particular receipt, but it does appear to be in my handwriting and I recall having had some contact with the person mentioned there in at approximately that time, and as I said before also I was connected with that case.

Q. You stated that you did prepare a first and final accounting and report for the administrator but that you are not certain that the document before the Court, Petitioner's [34] Identification 5 is the same petition, is that correct?

A. That is correct. That is correct to the best of my recollection.

Q. In connection with the preparation of the petition which you did prepare you stated that the truck was, the truck in the estate was valued at slightly less than the sale value to the Lomen Commercial Company?

A. To the best of my recollection the value or the offer that the Lomen Commercial Company tentatively made in the letter to the Commissioner seemed like a fair one and particularly under the circumstances of the truck being located in Nome, seemed very desirable to accept that and that was the Commissioner's thought on it before I had ever even seen it and I personally agreed with it.

Q. Were you paid for the truck prior to the

(Testimony of Cornelius P. Coughlan.)

time you filed the petition for permission to sell the truck?

A. No, I do not believe so. If you wish me to clarify that I will.

Q. If you wish to clarify it, what is the clarification?

A. To the best of my recollection the letter, first letter was received by the Commissioner. The Commissioner and I had a talk and we considered it desirable to accept the tentative offer made by the Lomen Commercial Company and I wrote a letter to them, if I am not mistaken, and they in turn made their offer a secure one and I informed them I believe either in the first letter or in a second letter that we would [35] have to go through certain Court procedure and after they received the paper they could send the check.

Q. Mr. Coughlan, Petitioner's Identification 9, which is a check from Lomen Commercial Company, is dated 30 September, 1951. It is perforated 10-8-51. The petition to sell personal property filed by Cornelius Coughlan, attorney in fact in the case of, in the Matter of the Estate of Raymond Silver, deceased, is dated at Fairbanks, Alaska, on the 30th day of October, 1951, and the petition for the first and final account which was filed in the same case on January 12, 1952, the truck is listed as being appraised in the value of five hundred dollars. Now, assuming you prepared the petition could you explain the difference?

A. The only way that I might be able to explain

(Testimony of Cornelius P. Coughlan.)

that from my recollection is that the inventory carried the truck as five hundred and the inventory was used in the preparation of the final account.

Q. Would you have done that even if you had received payment for the truck in the amount of nine hundred fifty dollars, despite the valuation of five hundred dollars, Mr. Coughlan?

A. I don't understand your question correctly. Would you repeat it?

Q. The valuation listed in the petition for final account, the three-quarter ton pick-up is five hundred dollars. The Lomen Commercial Company issued a check in the amount of [36] nine hundred fifty dollars on the 30th of September in payment for the truck and a petition to sell the truck located at Nome, a GMC pick-up truck in the amount of, in which it states that the petitioner has been offered the sum of nine hundred fifty dollars for the truck was filed November 1, dated the 30th day of October. Can you explain, assuming you did file the petition for the final accounting, why the appraisal value was used rather than the actual cash value?

A. Taking into consideration what you have, the entire scope of your question, until the truck was sold the appraised value of the truck was undoubtedly what would be carried on it, on the inventory.

The inventory would never change in that respect and the difference would be noted in the order for particular article. Now, I do not have any specific sale wherein the specific price was stated for that

(Testimony of Cornelius P. Coughlan.)

recollection in respect to the final accounting so I cannot state why it was carried one way or the other, whether the sale had been actually consummated at that time or had not been actually consummated at that time. It would appear from what you have stated that the Lomen Commercial Company possibly had a check that they were holding as of a particular date and referring to the past trial, that was had, where a man came down and testified from the Lomen Commercial Company, I believe I am not mistaken in the fact that he was leaving here and wanted the truck purchased and he was the only person there who had the authorization to make a purchase of that size. Now, I [37] would not say that that was true, but to my recollection that was what was true, so when they started their correspondence in respect to the truck the man who had the authority to purchase a truck and spend that sum of money wrote the check and then he was going outside and putting in the entire winter in Seattle and that to me, as I recall it now, may have been why the check is dated at one particular time. Obviously the check is dated prior to the petition for order to sell.

Q. It is also perforated, having been cashed before the petition to sell?

A. That may be. That may well be.

Q. The petition for final accounting shows that the value of the truck is five hundred dollars. Did you cash the Lomen Commercial Company check?

A. No, I did not.

(Testimony of Cornelius P. Coughlan.)

The Court: Who got the cash for it?

Mr. Coughlan: I wouldn't know, your Honor.

The Court: Well, you were familiar with the probate file, weren't you?

Mr. Coughlan: Yes, your Honor, I was familiar with it to this extent.

The Court: Well, I am just asking you if you were familiar with the attorney for the administrator and you were such?

Mr. Coughlan: And I do recall actually receiving a check from the Lomen Commercial Company. I recall that [38] extremely well, and that was placed in the file. In other words, when it was received it was placed in the file. There is a file cabinet and it contained some probate files.

The Court: And you never missed it?

Mr. Coughlan: No, sir, I never missed it until it was called to my attention.

The Court: Was that taken into consideration in the final account?

Mr. Coughlan: The final account, if I am not mistaken, your Honor, was typed by the girl in the office.

The Court: I am just asking you if that was taken into consideration in the final account?

Mr. Coughlan: I do not believe so, your Honor. I believe that the final account was typed. I may be wrong on this but I believe that the final account was typed somewhere in September or the first part of October. I think it was typed just about that same time.



(Testimony of Cornelius P. Coughlan.)

The Court: You mean there is some significance to typing or are you merely referring to a time?

Mr. Coughlan: I am referring to time.

The Court: There is no use talking about typing. You have testified here that all of these exhibits consisting of documents filed in the Probate Court were not prepared by you or not signed by you. And yet you say you are familiar with the file. Well, who did file them?

Mr. Coughlan: I have, I say, your Honor, that I [39] have no independent recollection of going up and filing the papers myself or whether Mr. Donhauser filed them or whether the girl from the office filed them.

The Court: That isn't the question. The question that you were asked repeatedly, whether it was your signature on each one of these documents?

Mr. Coughlan: And my statement was no.

The Court: And somebody else must have signed them?

Mr. Coughlan: That is my contention.

The Court: And somebody else filed them?

Mr. Coughlan: No.

The Court: Did you recognize the typing?

Mr. Coughlan: No, your Honor.

The Court: Who did your stenographic work?

Mr. Coughlan: The girl that worked in the office.

The Court: Do you recognize her work?

Mr. Coughlan: It was an electric machine.

The Court: Do you recognize her work?

Mr. Coughlan: No, I do not.

(Testimony of Cornelius P. Coughlan.)

The Court: But you have been rummaging through the file; presumably you finally closed the estate, didn't you?

Mr. Coughlan: No, your Honor, I did not.

The Court: You mean you never went through the file?

Mr. Coughlan: No, Your Honor, I did not.

The Court: What did you do?

Mr. Coughlan: Your Honor, this estate entailed [40] several heirs——

The Court: Well, I don't want you now to ramble along on something else. I am asking you whether somebody else could have filed all these documents and you was attorney and presumably examining the file at times and never become aware of it until you saw the documents here in Court?

Mr. Coughlan: No, your Honor, I did not. Mr. Donhauser also studied these documents in between times also.

The Court: Is this the first time you have seen these documents, Exhibits 1 to 7? Is this the first time you have seen them?

Mr. Coughlan: No, your Honor, I saw many of these identifications that have been offered here at the time of Cause No. 1651 Criminal that was tried here.

The Court: That was the first time you saw them?

Mr. Coughlan: To the best of my recollection, yes. I could not have seen them before that or I would have remembered them.

(Testimony of Cornelius P. Coughlan.)

The Court: So, therefore, your testimony here now is that all of them are forgeries?

Mr. Coughlan: Yes, your Honor, that is correct.

The Court: That is all I want to know.

Q. (By Mr. Stevens): Are you aware, Mr. Coughlan, that pursuant to the stipulation entered into between you and me there were certain documents sent to Washington as known handwriting standards? [41]

A. No, I do not know of any particular situation of that type. I do recall a stipulation wherein because of a defect in a notice to me in respect to matters——

Q. Mr. Coughlan, maybe you misunderstood me. It was not that you stipulated that these were known handwriting standards but you were aware that known handwriting standards were sent to Washington, were you not?

A. I was acquainted that you had sent some papers to Washington, D. C., yes.

Q. And the first one of those was Government's Identification 1, which purports to be a signature card of C. P. Coughlan on the account of C. P. Coughlan who was then a resident of the Nordale Hotel and attorney at law?

A. I believe that was one of the identifications.

Q. You now deny this is not your signature, is that correct?

A. That is correct. Fact of the matter is, I have never admitted that it was.

(Testimony of Cornelius P. Coughlan.)

The Court: That is a forgery also then, is it?

Mr. Coughlan: It is my contention that it is, your Honor.

The Court: Well, when did you first do anything about these forgeries?

Mr. Coughlan: Your Honor, one of the first times I did anything about these forgeries when they were referred to me was take them to the United States Attorney's office. [42] I believe that under the circumstances I was placed on the stand that I will be able to place Mr. Stevens on the stand at a latter date.

The Court: You didn't answer my question. When did you first do anything about these forgeries?

Mr. Coughlan: I don't recall the date, but I took them over and placed them——

The Court: What was the occasion on which you did anything and what was it that you did?

Mr. Coughlan: The occasion was approximately the 4th day of July, 1952, when someone told me on the street that the United States Marshal was going down to my office and attach everything in it. I went down there. I took some certain checks out of there and put them in Warren Taylor's safe. The checks that I took were ones that had been referred to me by the First National Bank.

The Court: I am not discussing, I am not asking you now what was done with certain checks or anything of that kind. I am asking you when is the

(Testimony of Cornelius P. Coughlan.)

first time that you did anything about these so-called forgeries?

Mr. Coughlan: I never knew that these were the things that they were charging me with until the time of the trial, your Honor.

The Court: The criminal trial?

Mr. Coughlan: The criminal trial.

The Court: What did you do then when you found out [43] they were forgeries?

Mr. Coughlan: I went on with the trial.

The Court: That is all.

Q. (By Mr. Stevens): In connection with the petition for the appointment of administrator for Raymond Silver, deceased, you have admitted that you did prepare a petition for Mr. Donhauser's, for such appointment?

A. Yes, as I recall I did.

Q. And as you recall it, did you according to law have the petitioner for the position of administrator swear that the facts stated in the petition were true. Did you notarize his signature?

A. I may not have. It may have been done by the secretary there in the office. I do not recall specifically taking his oath.

Q. Did your secretary use your seal and affix your signature as a notary at any time to your knowledge?

A. Not with my knowledge or I would have done something about it.

Q. You now deny though that the signature

(Testimony of Cornelius P. Coughlan.)

which appears on the petition for the appointment of the administrator is not your signature?

A. Yes, that is correct. I deny it.

Q. The oath of the administrator for Frederick Donhauser, did you prepare an oath for Mr. Donhauser in [44] connection with the matter of Raymond Silver, deceased?

A. I believe it was done in my office, yes.

Q. Did you notarize Mr. Donhauser's signature?

A. I have no recollection of notarizing his signature.

Q. If an oath was prepared in your office, would it have been notarized, Mr. Coughlan? Do you have another notary in your office?

A. Oh, yes, the girl was a notary.

Q. And did she use her own seal when she prepared oaths? A. Normally, yes.

Q. To your knowledge, did she use the seal of Cornelius P. Coughlan as a Notary Public?

A. It never came to my knowledge that she ever used mine.

Q. You now deny that you did not sign the Notary Public signature which appears on the oath of the administrator of the estate of Raymond Silver, which is Identification 3?

A. That is the one I looked at here. I deny that I signed it.

Q. And the petition to sell the personal property, the truck at Nome. You admit that you prepared a petition for that purpose, is that correct?

A. I prepared a petition, yes?

(Testimony of Cornelius P. Coughlan.)

Q. But you deny that the petition—did you sign the petition that you prepared?

A. I don't recall signing it, no. If I recall correctly the administrator signed it. [45]

Q. Do you deny that the petition which is before the Court here on the estate of Raymond Silver, signed by C. P. Coughlan, attorney in fact, is in fact your signature?

A. I deny that it is my signature.

Q. Identification 5, which is the first and final account report of the administrator, you have previously denied that your signature appears thereon as C. P. Coughlan, attorney for the administrator. Is that right?

A. If that is the one that you showed me here I deny that I signed it.

Q. However, you admit that the Identification 6, the check made payable to Jack Coughlan on the account of Collins and Clasby, the office account of Collins and Clasby, is your signature on the reverse side thereof?

A. I do not admit it is mine. I say it looks like my signature but I do not recall them making a check payable to Jack Coughlan. I believe that I was on the payroll as C. P. Coughlan.

Q. Identification 7, the receipt issued to C. P. Coughlan by Sergeant DeSpain in the amount of one hundred dollars which has the note on the reverse side thereof, did you admit that you signed this document?

(Testimony of Cornelius P. Coughlan.)

A. I don't recall signing it, although that does look like my signature.

Q. Do you deny it looks like your signature?

A. I recall being associated with that particular case [46] and I recall being in contact with Mr. Munsen whose name appears thereon at about that time.

Q. Do you admit that this is your signature?

A. I think it is.

Q. We can treat this then as a known handwriting standard, Identification 7, is that correct?

A. I think so even though I don't recall specifically signing it.

Mr. Stevens: Would the Court care for a recess at this time?

The Court: We will go until five o'clock.

Mr. Stevens: Very well, your Honor. Does the Court have any further questions of Mr. Coughlan at this time? We would like to call Mrs. Nordale.

Mr. Coughlan: Do I have an opportunity to cross-examine on this, give a cross-examination, your Honor?

The Court: What do you want to do, cross-examine yourself?

Mr. Coughlan: Yes, your Honor.

The Court: I think that is one of the handicaps that a person is under who represents himself. I don't know how we are going to conduct a cross-examination.

Mr. Stevens: For the purpose of the record, your Honor, do you have any statement qualifying



(Testimony of Cornelius P. Coughlan.)

any of the answers you have given here, Mr. Coughlan?

Mr. Coughlan: Yes, I do. [47]

Mr. Stevens: Would the Court permit us to request what it is.

The Court: Well, the Court hasn't got time to permit anybody just to ramble on and that is what would happen. If you feel there is something that has been omitted here that should be presented to the Court you may ask yourself the question so that counsel may have an opportunity to object to it.

Mr. Coughlan: Thank you, your Honor.

The Court: You want to explain. It seems to me that you have gone at great length to make explanations, but if you have left out something and want to explain it now and will be brief about it, you may proceed by way of narrative explanations, but otherwise the Court will have to—you have shown your disposition—not to make it unduly long or ramble. I will have to confine you by means of questions.

Mr. Coughlan: I call the Court's attention, and for the record to Petitioner's Identification 5, which purports to be a first and final account of report of administrator and petition for order settling for distribution, decreeing heirs and closing the estate. Now, this is stamped, filed January 12, 1952, before Clinton B. Stewart as United States Commissioner. I would like to call the Court's attention and the attention of the record to the fact that as I recall Mr. Donhauser wasn't even in town here at that

(Testimony of Cornelius P. Coughlan.)

time, that he had left town and wasn't here. And I believe that that is of some [48] importance in this matter. In respect to the petition for leave to sell personal property, I should like to state that Lomen and Company was well aware that this matter was in probate. They did not know who the administrator was at the time, but did know that it was, the estate was being administered through the Fairbanks Precinct. They then wrote through one of their officers to the Commissioner here requesting information concerning the purchase of that truck; that the Commissioner, instead of writing them back had me write to them which I did do explaining to them what the situation was as far as the estate was concerned; that there was no objection to a sale and that the tentative price looked good. The Commissioner in the meantime acknowledged their letter, wrote to them and acknowledged their letter telling them that they had received it and in the future to communicate through me with Mr. Donhauser. And they were well aware of that fact and that whenever that particular check was sent down here to the best of my recollection it was sent after the order for sale had been received by them, whether it was prior to this time shown here or not. I have no recollection concerning that but I, to the best of my recollection they received the order when they, then they sent this check. After they had received the order of sale they sent the check and there were some papers signed for the transfer of the truck, for the procuration of license plates,

(Testimony of Cornelius P. Coughlan.)

to utilize it on the road. And that is my recollection of this particular check. I do recall very [49] definitely seeing it come into my office, but it was after an order for sale had been signed. I should like the court to examine the appraiser's report in this matter. Do you have that here?

The Court: Now, before you get on that, I want to ask you some questions about this check, Petitioner's Identification, Petitioner's Exhibit for Identification No. 8. Now, you don't remember getting this check?

Mr. Coughlan: May I see it, your Honor?

The Court. You just looked at it?

Mr. Coughlan: Oh, well, I don't recall the number. Yes, I very definitely recall receiving that check in the office.

The Court: But do you contend that somebody forged the endorsement?

Mr. Coughlan: Yes, your Honor, since I did not sign it.

The Court: And obtained the money?

Mr. Coughlan: I don't know whether they obtained money or not, but I did not obtain the money on that check.

The Court: You didn't obtain the money on this check?

Mr. Coughlan: No, I did not.

The Court: Did you miss having this money?

Mr. Coughlan: No, your Honor, I didn't. I will ask the Clerk to mark this for identification. [50]

The Clerk: Respondent's Identification A.

(Testimony of Cornelius P. Coughlan.)

(Inventory of Silver estate was marked Respondent's Identification A.)

The Court: Incidentally, I want to ask another question about these checks. Whenever you receive checks of this kind in the course of your business as an attorney, what do you do with them? What is the first thing you do; do you enter them in a book?

Mr. Coughlan: In this particular case, I did, your Honor, by, entered it on a little note pad and placed it in the Silver file.

The Court: Did you enter it on any book in addition to that?

Mr. Coughlan: No, your Honor.

The Court: Then it was in your Silver estate file?

Mr. Coughlan: Yes, your Honor.

The Court: And so you must have run across that note sometime to the effect that you received that check, did you not?

Mr. Coughlan: Yes, I have a definite recollection of receiving that check and placing it in that file, your Honor.

The Court: Then what do you do with checks that come in like this?

Mr. Coughlan: That type of check I placed them in the file waiting for the administrator to come and do what, put it in the bank that he wishes it placed in. [51]

(Testimony of Cornelius P. Coughlan.)

The Court: Then your testimony is that you never missed the loss of this check?

Mr. Coughlan: No, sir, I did not, your Honor. I had no occasion to look for it.

The Court: And no one else missed it either?

Mr. Coughlan: No, your Honor, to my knowledge no one else did. No one else called it to my attention.

The Court: Somebody just made a clean get-away with the money from this check and nobody followed it up, is that so far as you know?

Mr. Coughlan: To my knowledge the first that I knew of it was at the time after the trial had started in 1651 Criminal, the first I knew of it.

Referring to the inventory in the matter of the estate of Silver, deceased, Frederick Donhauser, administrator, I will state that an inventory was filed in that particular estate as required by law within the time.

The Court: What point now are you directing my attention to?

Mr. Coughlan: Would the Court examine this?

The Court: I don't need to examine it. I am wondering though how this statement that you are making can have any bearing on the direct examination. You had better disclose that first so that we will see.

Mr. Coughlan: The United States Attorney was referring to time elements involved and apparent discrepancies. [52] I was pointing out a discrepancy here where the Court will note that in the order

(Testimony of Cornelius P. Coughlan.)

for sale which I do not believe is here, I will identify at this time. Do you have the order for sale here?

The Court: Well, you had better specify what the discrepancy is in.

Mr. Coughlan: The discrepancy is in the year it was filed, your Honor. It shows that it was filed in 1952.

The Court: You mean the inventory?

Mr. Coughlan: The inventory, your Honor.

The Court: Did the United States Attorney make any point of that?

Mr. Coughlan: He made a point only of the discrepancies, your Honor, and I was just merely giving statements concerning discrepancies in the rest of it.

The Court: Well, we can go through the files of this Court and probably give up a thousand discrepancies but that doesn't make it material evidence here so you will have to confine your statements to something else.

Mr. Coughlan: Your Honor, this is a pertinent fact that I am trying to get over in regard to this.

The Court: In regard to what?

Mr. Coughlan: In regard to this inventory that a previous order of the Court mentions that the inventory had been filed prior to that time.

The Court: What testimony already given by you [53] would that have a bearing on. Just what testimony would it be?

Mr. Coughlan: On the discrepancy in dates, your

(Testimony of Cornelius P. Coughlan.)

Honor, in respect to how they were filed and where. The estate, he has been questioning me concerning the state of the files in Probate Court.

The Court: I don't recall any such testimony. It seems to me that the only testimony so far as discrepancies was concerned was to some specific fact and now you are apparently intending to make a statement concerning discrepancies generally. The Court doesn't have time for that. If he made any, if he adduced any testimony from you as to a discrepancy concerning a particular thing, of course, you would have a right to explain that, but not by showing discrepancies generally, so you will have to go to something else unless you are through.

Mr. Coughlan: That is all, your Honor.

The Clerk: Petitioner's Identification 12 and Petitioner's Identification 13.

(Approval of Sale, dated November 1, 1951, was marked Petitioner's Identification No. 12.)

(Order for Sale was marked Petitioner's Identification No. 13.)

Q. (By Mr. Stevens): I hand you Petitioner's Identification 12, which purports to be an approval of sale, and petitioner's Identification No. 13 which purports to be an order for sale. They [54] are both dated the first day of November, 1951, is that correct?

A. Yes, they purport to be as you say and bear the dates that you say.

Q. Are those the documents which were pre-

(Testimony of Cornelius P. Coughlan.)

pared, or were those documents prepared by your office in connection with the estate of Raymond Silver, deceased?

A. I believe they were or they certainly were documents of the same type that were prepared.

Q. Do you remember preparing three documents, a petition for approval of sale, approval of the petition, and the order and filing them with the Commissioner?

A. I beg your pardon, sir.

Q. Do you remember preparing the three documents relating to that truck?

A. I have no specific recollection of them, concerning them.

Q. Mr. Coughlan——

The Clerk: Petitioner's Identification No. 14.

(Letter dated September 9, 1951, was marked Petitioner's Identification No. 14.)

Q. (By Mr. Stevens): This is Petitioner's Identification 14, a letter dated September 19, 1951, and addressed to the estate of——

A. Estate of Raymond Silver, care of United States Commissioner, Fairbanks, Alaska, attention, Mr. Donhauser. [55]

Q. Do you recall receiving that letter from the Commissioner?

A. I do not recall taking this letter into my possession. I very definitely recall receiving this letter,



(Testimony of Cornelius P. Coughlan.)

that the United States Commissioner referred me to it.

Q. Did you keep files in your office of the estate that you handled?      A. Yes, I did.

Q. And copies of all the documents you prepared in connection with the estate?

A. I believe so, yes, attempted to do so.

Q. And you kept copies of the letters you wrote in connection with the estate?      A. I believe so.

(Copy of letter from C. P. Coughlan was marked Petitioner's Identification No. 15.)

Q. (By Mr. Stevens): I hand you Identification 15 which purports to be a copy of a letter from C. P. Coughlan, attorney at law, and also Identification 16, both of which letters I removed from this file which is in possession of the government which purports to be the file of C. P. Coughlan of the estate of Raymond Silver.

(Letter from Lomen Company, Nome, Alaska, was marked Petitioner's Identification [56] No. 16.)

Mr. Coughlan: I have examined Petitioner's Identification 15 and I do not specifically recall writing that particular letter, but there was a letter of that nature written very definitely.

(Copy of letter to Lomen Commercial Company, Nome, Alaska, was marked Petitioner's Identification No. 17.)

(Testimony of Cornelius P. Coughlan.)

Q. (By Mr. Stevens): I hand you Petitioner's Identifications 16 and 17, two similar letters, one from the Lomen Commercial Company.

A. I have not examined that.

Q. You have not examined that? Would you examine that first then. Would you examine that and keep the record straight. That is Petitioner's Identification 14.

A. I have examined Petitioner's Identification 14.

Q. Petitioner's Identifications 16 and 17 are two more letters from the file of C. P. Coughlan, attorney for the estate of Raymond Silver, both of them concerning the same truck. Did you receive the letter from the Lomen Commercial Company which is Identification 16?

A. I believe that that is the letter that I previously referred to, yes.

Q. And that letter states that enclosed therewith was a check in the amount of nine hundred fifty dollars?

A. So enclosed our check on the Seattle First National Bank in the amount of nine hundred fifty dollars in full payment of same. [57]

Q. And Petitioner's Identification 17, Mr. Coughlan, is a copy of an acknowledgement letter purportedly written by C. P. Coughlan; did you write that letter?

A. I don't specifically recall writing Identification. Petitioner's Identification 17, but I must have

(Testimony of Cornelius P. Coughlan.)

written a letter very similar to it. In all probability that same letter.

Q. And that letter acknowledges receipt of the letter enclosing the check, does it not?

A. I believe it does. Yes, apparently so. It would appear that it refers to the same letter that appears in Petitioner's Identification 6.

Q. In order then to clear the record at this time, Mr. Coughlan, you admit the signature on Government's Identification 7?

A. May I see Government's Identification 7?

Q. That is the receipt which was signed on the back of the bail slip?

A. Yes, I believe that that is my signature, although I do not specifically recall having written it. It looks like my signature and I was associated with that particular paper.

Q. But you deny that all other signatures presented to you on Government's Identifications 1 through 6 are your signatures?

A. All of the signatures that I denied making myself I still deny making.

Mr. Stevens: We have nothing further, Mr. Coughlan. [58]

The Court: Do you wish to add anything further to what you have said in response to these last questions on redirect examination.

Mr. Coughlan: Yes, your Honor, referring to the last Identifications that just went in, may I examine them?

The Court: 16 and 17.

(Testimony of Cornelius P. Coughlan.)

Mr. Coughlan: No, I mean the last ones referring to the probate file. They would be the order and the petition for order.

The Court: Well, what—were you examined concerning those on redirect?

Mr. Coughlan: Yes, I was, your Honor. He has been examining me concerning them.

The Court: You mean this order?

Mr. Coughlan: Yes, your Honor, and there is a petition for the order, I believe. Yes, the approval of the sale.

Mr. Stevens: Did you have any other matter to state, Mr. Coughlan?

Mr. Coughlan: Yes, I do. I am going to attempt to state it here. Now, I should like to state that at the time that the petition for order to sell, the order to sell and the approval for sale were made there was an inventory on file upon which these, upon which the petition for order to sell, the order and the approval of the sale were based; that the United States Commissioner at that time had as required by law the inventory of the estate; that he examined the [59] inventory of the estate and determined that the value that the appraisers had placed upon the three-quarter ton GMC pick-up truck; ascertained that it was five hundred dollars as of Fairbanks prices and decided that nine hundred fifty dollars was a good price for it. One might note that that was filed on November 1, 1951—November 1, 1951, and this inventory shows on the May 7, 1952.

The Court: You have nothing further?

(Testimony of Cornelius P. Coughlan.)

Mr. Coughlan: I do not believe so, your Honor.

The Court: Well, we will recess at this time. We will perhaps adjourn. What is the opinion of counsel as to how long this case will last?

Mr. Stevens: The government called Mr. Coughlan first so that we might ascertain how many of these documents we must establish by independent testimony and it is now our opinion, your Honor, that it will take two days to present the government's case?

The Court: What is your opinion?

Mr. Coughlan: As to the defense? I believe two days, your Honor.

The Court: Are you speaking now of the entire case or as to the defense only?

Mr. Coughlan: I thought I was speaking in the same manner that the United States Attorney was. Two days for my side and two days for his. Isn't that what you meant, two days for your case? [60]

Mr. Stevens: Yes. I meant that our side would take two days to put on, the government's witnesses, your Honor.

The Court: Of course, what I was interested in particularly is how long it would take all together. I am assuming then it will take four days.

Mr. Stevens: If Mr. Coughlan's statement is it will take two for his.

The Court: We will recess for five minutes and go on until about 5:30.

(Thereupon, at 5:10 p. m., the court took a

recess until 5:15 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Clerk: Court is reconvened.

Mr. Stevens: Mrs. Nordale, please.

LaDESSA NORDALE

a witness called in behalf of the petitioner, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Would you state your name to the Court, please.

A. LaDessa Nordale.

Q. Where do you reside, Mrs. Nordale?

A. Fairbanks, Alaska.

Q. And what is your position here at Fairbanks?

A. United States Commissioner, Fourth Division, Fairbanks Precinct. [61]

Q. When did you become the Commissioner for this precinct? A. June 1st, 1952.

Q. Are you aware of who was your predecessor in office? A. Yes.

Q. Who was your predecessor?

A. Mrs. Boring.

Q. Do you know of your own knowledge who preceded that lady? A. Yes.

Q. Who was that? A. Clinton Stewart.

Q. Now, Mrs. Nordale, this is Government's Identification 2, which purports to be a document from the estate of Raymond Silver, estate No. 1418

(Testimony of LaDessa Nordale.)

in the Commissioner's Court. Could you tell the Court whether or not that is a record of your Court?

A. It is.

Q. And is that a document from the estate of Raymond Silver? A. Yes.

Mr. Coughlan: Your Honor, at this time I am going to object to any further questions propounded by the United States Attorney under the information before this Court for the reason that the same is an amended information in Cause No. 7521 civil. We are here under the rules of equity. The [62] original action was filed here in this Court as——

The Court: Well, I don't care about the date. You made your point I assume. The objection is overruled. Proceed.

Q. (By Mr. Stevens): I hand you Petitioner's Identification No. 3, which purports to be another document from the estate 1416 in this Precinct. Could you tell us, is that an official record of your Court? A. It is.

Q. And on both Identifications 2 and 3, does there appear the stamp of the United States Commissioner? A. It does.

Q. In this Precinct? A. Yes.

Q. Here is Plaintiff's, or Petitioner's Identification 4 which purports to be another document from the same estate, that is a part of the official record of your Court? A. It is.

Q. And does it bear the official stamp thereon?

A. It does.

Q. And the last is Identification 5.

(Testimony of LaDessa Nordale.)

The Court: I am wondering why the parties can't stipulate that these are records of the Commissioner's Court. No reason, it seems to me. There is no dispute over them.

Mr. Coughlan: Your Honor, in the first place, they have not been in her continuous, to my [63] knowledge they have not been continually in the records of the Commissioner's Court. They have been removed for a long period of time from there.

The Court: Well, you are just not willing to stipulate then, as I understand it.

Mr. Coughlan: Well, I would be willing to stipulate with that particular point reserved. I am willing to stipulate with that particular point reserved.

Mr. Stevens: I believe the matter is almost covered now, your Honor.

The Court: Well, all files leave the custodian at times, so there wouldn't be anything unusual.

Mr. Coughlan: Yes, I am willing at this time, if the Court please, and if Mr. Stevens, to stipulate that these Identifications were originally taken from the Probate Court.

The Court: Well, that isn't the kind of stipulation that we want. All we want is a stipulation that these are the records of the Probate Court.

Mr. Coughlan: Yes, and considered the records of the Probate Court.

The Court: If you can't stipulate that they are the records why we might as well have the Commissioner testify.



(Testimony of LaDessa Nordale.)

Q. (By Mr. Stevens): Are you personally familiar with Identification 5, Mrs. Nordale?

A. No, I am not.

The Clerk: Petitioner's Identification [64]  
No. 18.

(Order of Court to release Probate papers  
was marked Petitioner's Identification No. 18.)

Q. (By Mr. Stevens): Could you tell us how these documents left your file?

A. On an order of the District Court.

The Clerk: Petitioner's Identification 19.

(Order Settling Final Account was marked  
Petitioner's Identification No. 19.)

Q. (By Mr. Stevens): I hand you Identification 18. Would you state to the Court, is that a copy of the order which permitted you to release these records? A. It is.

Q. Now, in connection with this estate, Mrs. Nordale, did you discuss the closing of the estate with Mr. Coughlan? A. Yes.

Q. I hand you Petitioner's Identification 19, which purports to be an order for the settling of the estate. Is that stamped as having been filed with your Court? A. Yes.

Q. And was it filed with you personally?

A. Yes.

Q. Did you discuss that purported order with Mr. Coughlan? A. I did. [65]

Q. Did you sign the order closing the estate?

(Testimony of LaDessa Nordale.)

A. I did not.

Q. And was that order based upon or purportedly based upon the petition for closing which has already been filed in this case, or you identified?

A. Yes.

Q. Could you tell the Court why you did not approve it?

A. Because there were no supporting papers to check the final accounts such as cancelled checks, etc.

Q. And at that time did you refuse to settle it, permit Mr. Coughlan to settle the estate?

A. I explained to Mr. Coughlan at that time that I could not sign the paper that day until the final account had been checked.

Q. Did Mr. Coughlan present the final accounting papers to you?

A. Yes, Mr. Coughlan brought this paper in himself in the afternoon.

Mr. Stevens: Your witness, Mr. Coughlan.

#### Cross-Examination

By Mr. Coughlan:

Q. Mrs. Nordale, recalling the time that the order for the closing of the estate was brought to you, do you have a clear recollection of that particular day?

A. I remember, Mr. Coughlan, it was either a Thursday or a Friday as I recall. It was toward the end of the week. [66]

(Testimony of LaDessa Nordale.)

Q. Do you recall that I talked to you prior to the time that I brought in this order?

A. No, I don't, Mr. Coughlan.

Q. Do you recall whether or not I checked out the Silver estate file for Mrs. McNealy to type that order?

A. I can't answer that for sure. However, we have a book in which your name would be entered and the date if the estate had been removed from the office and also when it was returned. I would have to look at that book to refresh my memory, Mr. Coughlan.

Q. Do you have that book available here?

A. Yes, it is in our office.

Q. That is close by?                    A. Second floor.

Q. Could you procure that easily, that book?

A. I think so.

The Court: What is the purpose of this now?

Mr. Coughlan: I was merely laying some foundation, your Honor, concerning a prior conversation on the same day concerning the transaction that has been testified to here, namely that Mr. Coughlan presented her with a form of an order.

The Court: Well, that doesn't make everything that was said concerning it relevant testimony here, Mr. Coughlan.

Mr. Coughlan: I beg your pardon, sir.

The Court: That doesn't make everything that was said concerning this order relevant here. [67]

Mr. Coughlan: I understand that, your honor.

Q. (By Mr. Coughlan): Do you recall, Mrs.

(Testimony of LaDessa Nordale.)

Nordale, that I talked with you prior to bringing this order?      A. No, Mr. Coughlan, I do not.

Q. Do you recall contacting me in regard to getting an order in?

The Court: Well, how would it be material if she had? That is what I am getting at. After all——

Mr. Coughlan: For this reason, your Honor, I should like to bring out that my files and records were attached at that time; that I was asked to get in a final account in this matter and did not have my files and records available to refer to; that the inventory was referred to from the Probate records in Mrs. Nordale's possession at that time.

The Court: Well, if it becomes material you can prove it on your defense, but it is not proper cross-examination.

Mr. Coughlan: Your Honor, the witness has testified concerning something that occurred at a particular date. May I test her memory as to the events that occurred immediately preceding that and immediately after that?

The Court: What has she testified to on which you want to test her memory?

Mr. Coughlan: She has testified concerning the date and the events leading to that particular Identification, the order being filed with her. She [68] states that she received it herself rather than some clerk receiving it.

The Court: What difference does it make who received it? It would be received for the Probate Court.

(Testimony of LaDessa Nordale.)

Mr. Coughlan: I understand that, your Honor, but the testimony was that she received it personally.

The Court: Well, that isn't a material matter here. We have got to stick to material matters or we will never get through.

Q. (By Mr. Coughlan): Mrs. Nordale, would you state whether any particular thing must be done prior to a United States Commissioner signing an order for sale of property or approving the sale?

A. The law requires that certain papers be filed in Probate prior to the approving of a sale.

Q. And what papers are those?

A. Well, they go right down through the Probate papers.

Q. Does the inventory have to be filed?

A. Yes.

Q. Do you recall whether or not you were aware that there had been a sale of personal property at the time that this order was presented to you?

The Court: What difference would it make if she did or did not?

Mr. Coughlan: Your Honor, because there was certain conversation there.

The Court: She is on cross-examination. [69]

Mr. Coughlan: This is not cross-examination, your Honor?

The Court: No, not proper cross-examination, not within the scope of the direct examination.

Q. (By Mr. Coughlan): Would you state whether or not you said that you received these papers directly, I mean in response to a question by

(Testimony of LaDessa Nordale.)

the United States Attorney would you state whether or not you testified here that you personally received the order closing the estate?

The Court: Never mind answering. It makes no difference whether she received it personally.

Q. (By Mr. Coughlan): Did you state in your testimony in response to a question propounded to you by the United States Attorney that you had had a conversation with me at the time of receiving that particular Identification which is an order closing an estate? A. Yes, we discussed it.

Q. Did you state that you had a conversation with me, would you answer that, yes or no, whether you had a conversation?

A. You mean here now?

Q. Yes, did you testify in response to a question?

A. Yes.

Q. Propounded to you by the United States Attorney? A. Yes. [70]

Q. Concerning that conversation that you have testified to here, would you state whether or not you recall that I attempted to have you sign that order without first bringing the checks and the other matters to your attention, bringing them before the Court?

A. You brought it to me personally, Mr. Coughlan, and asked me if I would sign it. You were anxious to close the estate and you were going off on some week end trip. I remember that, and I explained to you the reason why I could not sign it

(Testimony of LaDessa Nordale.)

until the cancelled checks were presented and we could check the final account. Then I recall we went, this happened in the main Commissioner's office there at the old counter. Then we walked into the other office where the girl is that handles probate and I faintly recall that you did ask for some paper and Mrs. McNealy's name came into it. I do recall that.

Q. Now, in connection with that specific conversation, do you recall whether or not I stated to you at that time that my records and files had been attached?

The Court: I have already said it is a matter of defense.

Q. (By Mr. Coughlan): Mrs. Nordale, since you have become United States Commissioner, could you tell me whether or not any of the probate files connected with this estate have been altered?

A. Well, not to the best of my knowledge they have not. [71]

Q. Have not the docket, typewritten docket, has it not been altered?

A. The, a corrected sheet has been——

The Court: Never mind answering that. There is no docket that is in issue here, none whatever. There isn't anything here in the direct examination of this witness as to her records in that respect. I am not going to permit you to launch into an investigation now as to a possible alteration that may have been made over a long period of time in the records. If it becomes necessary to show alterations, you

(Testimony of LaDessa Nordale.)

have evidence of that, you can offer it on your defense.

Mr. Coughlan: If the records or any part of them that have been presented here have been altered, your Honor, and it is within the knowledge of this particular witness——

The Court: You can ask her specifically about any of these. There has been nothing received in evidence. It has been merely marked for identification. If you want to ask her about any of these exhibits for identification you may do so, but only within the scope of the direct examination. She was not examined, or asked anything concerning records of any of these exhibits. So if she didn't go into that it is not within the scope of the direct examination, not proper cross-examination.

Q. (By Mr. Coughlan): Concerning the conversation that you testified to [72] in response to the question propounded by the United States Attorney, do you recall any other fact that you have not mentioned concerning that testimony?

The Court: Better call her attention specifically to some fact you think she has omitted. A general question at this time is not permitted. You can't permit a witness to speculate on the possibility of having forgotten anything. If you think she has forgotten anything just call her attention to it.

Q. (By Mr. Coughlan): Recalling then the specific conversation that was had, according to your testimony between you and myself in the United States Commissioner's office, would you state



(Testimony of LaDessa Nordale.)

whether or not our conversation included the name Mrs. McNealy, or Mary McNealy?

A. Mr. Coughlan, I faintly recall something being mentioned about Mrs. McNealy.

Q. Do you have any recollection concerning that specific conversation wherein it was mentioned that I would need to make the order or had made the order from the files appearing in this Court House?

A. No, I can't recall that, Mr. Coughlan.

Q. Did you testify concerning the same Identifications in a prior action? A. I did.

Mr. Coughlan: That's all. [73]

Mr. Stevens: Just a minute, one question, Mrs. Nordale.

Redirect Examination

By Mr. Stevens:

Q. Mr. Coughlan asked you if you went through the file there with him. Did he question you concerning the appearance of any of these four documents you have identified in that file? A. No.

Q. Did he claim at that time that the signatures thereon were not his? A. No.

Q. Did he claim that they were forgeries?

A. No.

Q. Did he ask to withdraw the file or attempt to check to see where the documents had come from?

A. No.

Q. Did he deny that he as attorney for the estate had filed them? A. No.

Mr. Stevens: Your witness, Mr. Coughlan.

(Testimony of LaDessa Nordale.)

Recross-Examination

By Mr. Coughlan:

Q. Did we examine the file together?

A. I don't recall our doing so, Mr. Coughlan.

Q. Well then, your answers in response to [74] the United States Attorney's were no or in the negative because we had not done any such thing at all. We had not examined any portion of it?

A. To the best of my knowledge you never brought to my attention any record in the probate file of the Silver estate that was questionable in any way and I thought that is what the District Attorney was asking me.

Q. Well, for the record, did we or did we not go through the file together at that time?

The Court: She has already answered that question. You will have to go on to something else.

Mr. Coughlan: It was my understanding, your Honor, that she conditioned it upon her understanding of the United States Attorney's question.

The Court: Well.

Mr. Coughlan: That is all.

Mr. Stevens: Thank you, Mrs. Nordale.

(Witness excused.)

Mr. Stevens: We have one witness that is before the Court just for the purpose of identifying the record. Take a matter of minutes, if your Honor would permit it.

The Court: What kind of record?

Mr. Stevens: The record from the criminal trial.

The Court: Why can't you stipulate?

Mr. Stevens: Will you stipulate that it is?

Mr. Coughlan: I don't know what you are talking about. [75]

Mr. Stevens: Will you stipulate that this record is a record of the criminal trial?

Mr. Coughlan: I will stipulate to the fact that—stamp it for Identification.

The Clerk: Government's or Petitioner's Identification No. 20.

(Record of trial, cause No. 1651 Criminal was marked Petitioner's Identification No. 20.)

The Court: Why mark it for Identification. My question is whether you will stipulate that it is the record?

Mr. Coughlan: That is for the purpose of stipulation, your Honor. We cannot refer to it without an identification mark.

The Court: No use of marking it for identification when it can be marked as an exhibit. It just means duplicating the work.

Mr. Coughlan: We have to have something to refer to it by.

The Court: I don't want to have these marks put on twice because it is just time-consuming. If you can stipulate that is the record it will be marked as an exhibit, not mark it for identification.

Mr. Coughlan: Will you mark it as an exhibit?

Mr. Stevens: Your Honor, the reason we don't ask Mr. Coughlan to stipulate on these things, he always qualifies his stipulations. [76]

The Court: You might as well put the witness on the stand.

Mr. Coughlan: Your Honor, I believe you will accept my stipulation on this thing. I just want to refer to it.

The Court: Just do it in a few words. Don't argue about it.

Mr. Coughlan: I will, your Honor. I stipulate that Petitioner's Exhibit A is a true and correct transcript of the proceedings of cause No. 1651 Criminal, held in the District Court for the District of Alaska, Fourth Judicial Division, United States of America, plaintiff, versus C. P. Coughlan, defendant.

The Court: I should think that would be numbered instead of lettered.

Mr. Coughlan: Your Honor, here in this Court the system has been that for the one party they use numbers for the identification, letters for the exhibits. Then for the other party they use just the opposite. They will use letters for identification and numbers for the exhibit.

The Court: Whatever the local practice is.

Mr. Coughlan: I believe that that constitutes a sufficient stipulation, does it not, your Honor.

The Court: Well, that is up to counsel here. Are you satisfied?

Mr. Stevens: That is an unqualified [77] stipula-

tion that this is a full, true and correct copy of the proceedings before this Court?

Mr. Coughlan: Taken by Esther Midthun, the official court reporter at this time.

Mr. Stevens: Thank you, your Honor. That is accepted.

The Clerk: Petitioner's Exhibit A.

(Record of trial, cause No. 1651 Criminal, was received in evidence as Petitioner's Exhibit A.)

The Court: We will adjourn at this time until 9:30 tomorrow morning.

The Clerk: Court is adjourned until 9:30 tomorrow morning.

(Thereupon, at 5:50 p.m., the trial of this cause was adjourned until March 21, 1955, at 9:30 a.m.) [78]

United States of America,  
Territory of Alaska—ss.

I, Mary F. Templeton, official court reporter for the District Court, District of Alaska, Fourth Judicial Division, Fairbanks, Alaska, do hereby certify:

That I was the official court reporter for the above-named Court on March 20 and 21, 1955, the dates upon which the cause entitled *In the Matter of the Disbarment of Cornelius P. Coughlan, Attorney at Law*, was heard;

That I recorded in shorthand all of the oral proceedings had in open Court upon March 20, 1955.

That the foregoing pages, numbered 1 to 78, inclusive, are a full, true, complete and accurate transcript from my original shorthand notes.

Dated at Fairbanks, Alaska, this 13th day of July, 1955.

/s/ MARY F. TEMPLETON.

Subscribed and sworn to before me this 13th day of July, 1955.

[Seal] /s/ JOHN B. HALL,  
Clerk of Court. [78-A]

March 22, 1955, 9:30 A.M.

Mr. Stevens: Government is ready to proceed, your Honor. Your Honor, just a statement for the record. I understand there is some misunderstanding concerning my statement in regard to the two photostats of the microfilm checks which appear before the court as exhibits now.

The Court: I think that has been cleared up now, so it is not necessary to refer to it.

Mr. Stevens: Thank you. We call Mr. Cartwright, please.

WILLIAM M. CARTWRIGHT

a witness called in behalf of the petitioner, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Would you state your name for us, please?

A. William M. Cartwright.

(Testimony of William M. Cartwright.)

Q. Where do you reside, Mr. Cartwright?

A. Fairbanks.

Q. What is your business, sir?

A. I am a cashier of the Bank of Fairbanks.

Q. You were previously on the stand for some length of time in connection with the criminal case against Mr. Coughlan were you not? A. Yes.

The Clerk: Petitioner's Identification No. 20. [80]

Q. (By Mr. Stevens): What was your position at the time you were testifying on the prior occasion?

A. It was auditor of the Bank of Fairbanks.

The Clerk: Petitioner's Identification No. 21.

Q. (By Mr. Stevens): And your duties as auditor were put in the record at that time, were they not? A. That is right.

Q. I hand you Petitioner's Identification No. 20 and ask you——

Mr. Coughlan: Your Honor, I object to any further testimony elicited from this witness until he has been qualified in this particular case.

The Court: Qualified in what respect?

Mr. Coughlan: As to his duties.

The Court: Until he attempts to testify to something for which he needs to show special qualification the objection is overruled.

Q. (By Mr. Stevens): Can you identify that for us? A. Yes, this is a deposit——

Mr. Coughlan: Just a moment, please. I have an objection to make. He has now been asked to identify some particular thing, your Honor, and he has

(Testimony of William M. Cartwright.)

stated that he was an [81] auditor at one time and I believe he stated that he is a cashier at this time and I wish the record to show which one he is testifying to here.

The Court: You have cross-examination and he can't show everything with one question. Now let's not interrupt so much. Objection overruled.

Q. (By Mr. Stevens): Mr. Cartwright, what were your duties as auditor?

A. As auditor I was in charge of verification of records for the bank.

Q. And was it your duty to supervise the keeping of the records for the bank?

A. Yes, it was.

Q. And is the document you have in your hand a record of the Bank of Fairbanks? A. It is.

Q. Could you tell us what it purports to be?

A. This is a deposit slip of the checking account of the Bank of Fairbanks.

Q. Do you have the date of that shown by a stamp on your deposit slip?

A. Yes, this shows the deposit was taken by Note Teller "O," December 17, 1951.

Q. I show you Government's Identification 8, 5 checks in this identification, and ask you if you can state what that is? [82]

A. This is a check drawn on the account of Frederick Donhauser, Administrator of the Silver Estate, dated December 12, 1951, payable to C. P. Coughlan and has a "cash paid" stamp from Note Teller "O," December 17, 1951.



(Testimony of William M. Cartwright.)

Q. The same teller's stamp?

A. The same teller's stamp and the same date.

Q. This is Petitioner's Identification No. 9, Mr. Cartwright. Would you tell us what that is, please?

A. This is a check drawn on the account of the Lomen Commercial Company, the main office of the Seattle First National Bank in Seattle, Washington, in the amount of \$950.00, payable to C. P. Coughlan, Attorney, and shows a "cash paid" stamp of October 3, 1951, and it is endorsed by C. P. Coughlan, Attorney.

Q. The "cash paid" stamp, does it also show where the cash was paid?

A. It was paid at Cage 2 of the Bank of Fairbanks.

Q. And could you tell us what those two stamps together would mean to you as auditor of the Bank of Fairbanks, in regards to that check?

A. Well, cash was paid to the endorser of the check.

Q. This is Petitioner's Identification No. 1, Mr. Cartwright. Would you identify that for us?

A. This is a signature card of the account of Cornelius P. Coughlan which was taken from the Bank of Fairbanks signature card file. It was accepted by the bank on April 12, 1951. [83]

Q. Now, what is the purpose of such a card in your bank?

A. To show the authorized signature of the checking account at the bank.

(Testimony of William M. Cartwright.)

Q. This is Petitioner's Identification No. 22, Mr. Cartwright. Would you tell us what that is, please?

A. This is a ledger sheet of the account of Cornelius P. Coughlan of his checking account at the bank.

Q. And is that a record kept in the normal course of business in your bank? A. It is.

Q. Is it normal course of business to keep such a record? A. Yes.

Q. Can you locate the item we have previously discussed, the \$400.00?

A. This ledger sheet shows a \$400.00 deposit on the account of Cornelius P. Coughlan on December 17, 1951.

Q. What other deposits does this record show, Mr. Cartwright?

A. January 8, 1952, a deposit of \$100.00; September 24, 1951, a deposit of \$500.00; October 3, 1951, a deposit of \$500.00; November 28, 1951, a deposit of \$19.78.

Q. There was a deposit on October 3, you stated?

A. Yes, in the amount of \$500.00.

Q. That was the same date that Petitioner's Identification No. 9 was endorsed through your bank, is that correct?

A. That is correct. [84]

Q. I hand you Petitioner's Identification No. 21 this time, Mr. Cartwright, and could you tell us what that is, please?

A. This is the original ledger sheet of the checking account of the Estate of Raymond Silver, de-

(Testimony of William M. Cartwright.)

ceased, showing the authorized signer to be Frederick Donhauser, as administrator.

Q. Now, would you tell us whether or not that ledger sheet shows the withdrawal of three \$1,000.00 checks?      A. It does.

Q. And what are the dates that those checks went through your bank?

A. On December 17, 1951, January 15, 1952, and April 5, 1952.

Q. I hand you Petitioner's Identification No. 10 and ask you if you can state what that is?

A. This is a photostat copy that was taken from the microfilm records from the Bank of Fairbanks of a check in the amount of \$1,000.00 drawn by Frederick Donhauser, as Administrator of the estate of Raymond Silver, deceased, dated January—I believe it is 12, 1952, payable to C. P. Coughlan and it bears the endorsement of C. P. Coughlan.

Q. Mr. Cartwright, does your bank keep records of the checks which pass through the accounts of your depositors?      A. We do.

Q. And how are those records kept?

A. We microfilm all items going through the bank.

Q. And was there microfilm kept of the [85] account of the estate of Raymond Silver?

A. Yes.

Q. And have you previously located the checks which passed through that account for the purpose of presenting the microfilm in court?

(Testimony of William M. Cartwright.)

A. I have.

Q. And you presented the film itself in court, did you not?      A. Yes.

Q. And is this Identification No. 10 related to that demonstration that you made?

A. Yes.

Q. What is this Identification No. 10 in regards to the microfilm?

A. It is a photostat copy from the microfilm——  
Mr. Coughlan: I can't hear the witness.

A. It is a photostat copy of the microfilm check.

Q. And this photostat copy is a copy of a copy you made of the checks on microfilm, is that correct?

A. Yes.

Q. Is it sufficiently clear so that you can identify the account, the amount, the date, and the endorser?

A. Yes.

Q. I hand you Petitioner's Identification No. 11, Mr. Cartwright. Could you tell us whether or not that is also a photostat of a microfilm copy of the check of your bank? [86]

A. It is.

Q. Can you tell us the account upon which that Identification No. 11 was drawn?

A. It was drawn on the account of Frederick Donhauser as Administrator of the estate of Raymond Silver, deceased.

Q. And is it sufficiently clear on the reverse side so you can tell the endorser and where the check was negotiated?      A. Yes.

Q. Would you tell us, please?

(Testimony of William M. Cartwright.)

A. It was endorsed by C. P. Coughlan and was negotiated through the First National Bank of Fairbanks on April 4, 1952.

Mr. Coughlan: I am going to move that that last question be struck for the reason that there has been no foundation shown that this man recognizes that the check was endorsed by any particular person. There is no showing that he is an expert in the field of handwriting and can determine who actually endorsed the check. He may state, I believe, under his qualification and on the witness stand that there appears to be words and letters spelling C. P. Coughlan as an endorsement, but stating that it was endorsed by C. P. Coughlan, unless it was done in his presence or there is a foundation laid to the effect that he is a handwriting expert, makes it incompetent evidence.

The Court: Objection overruled. Nobody has to testify to anything absolutely. He may testify in court to his best knowledge and recollection. That is sufficient to make it [87] competent. Proceed.

Q. (By Mr. Stevens): You had a signature card, which was previously identified here as Petitioner's Identification No. 1, in possession of your bank at that time, did you not? A. Yes.

Q. And the statements for the account of Raymond Silver, to whom did you send those? Does your card show you—what is that? Identification No. 21? A. Yes.

Q. Does Identification No. 21 show you where you sent the statements for this account?

(Testimony of William M. Cartwright.)

A. The statements were sent in care of C. P. Coughlan, Nordale Hotel, City.

Q. How often does your bank send statements?

A. Monthly.

Q. Now, at the first of 1952, in January of 1952, did Mr. Coughlan come to you and claim there were forgeries in the account of the estate of Raymond Silver?      A. Not to me personally.

Q. Do you know if he appeared at the bank at any time before all this action was started, before the criminal case or the seizure of the records by the Government? Do you know if he came to your bank, of your own knowledge, and made an allegation of forgery on the account of Raymond [88] Silver?

A. I was told by Mr. Johnson, president of the bank, that he had appeared and made such a statement.

Q. Do you know when that was?

A. I don't remember when it was.

Q. Mr. Johnson is no longer with you, is that right?      A. That is right.

The Court: Who told you that he appeared before Mr. Johnson?

A. Mr. Johnson did.

The Court: Do you recall whether that was before there were any charges made against the Respondent?

A. I am certain it was.

The Court: Why are you certain? I mean, how can you be sure?

(Testimony of William M. Cartwright.)

A. Because as I remember it was Mr. Coughlan's statement to Mr. Johnson; that was our first indication that there was pending trouble with this account.

The Court: What did the bank do about it?

A. We investigated the checks on our microfilm records then.

The Court: Did you report it to the United States Attorney?

A. I don't know whether such a report was made to him then or not.

The Court: Well, was it ever made to the United States Attorney? [89]

A. I can't testify as to that.

The Court: What did the bank do about it besides examining the records?

A. Mr. Johnson actually handled the negotiations regarding this claim and I personally did nothing about it until the case came to court.

Mr. Stevens: The testimony of Mr. Johnson, in regard to this, appears in the record which has already been entered, your Honor, at page 57—beginning at page 56 he was qualified, stated his name. Your witness, Mr. Coughlan.

## WILLIAM M. CARTWRIGHT

testified as follows on

## Cross-Examination

By Mr. Coughlan:

Q. Mr. Cartwright, referring to Identification No. 20. That appears to be a deposit slip?

A. Yes.

Q. From that deposit slip and your experience at the bank can you state what it purports to show? In other words, explain what the deposit slip means?

A. It is the entry that covers \$400.00 deposit to the account of C. P. Coughlan.

Q. And does it show how the deposit was made?

A. I don't follow you.

Q. You have stated that it is for the purpose of recording [90] a deposit to a certain account. Does the words or figures thereon signify it was made in a particular manner, the deposit? In other words, in cash specie, check, draft, or other method.

A. The figures show opposite the word "check."

Q. And from your experience in the bank and your knowledge of this particular Identification, which is Identification No. 20, would you state whether or not such a deposit slip indicates that a \$400.00 check was deposited to that account?

A. I can't tell from the way the deposit slip is made up for sure what actually was deposited.

Q. Yes. Normally is that not the custom of your bank, when a person deposits a check in the sum of



(Testimony of William M. Cartwright.)

\$400.00 to have that person or one of the tellers make out a deposit slip wherein the name of the account is placed on the top of the deposit slip and the figure \$400.00 is put adjacent to the word "check" or "checks"? A. That is customary.

Q. Therefore, that would indicate, would it not, that a \$400.00 check had been deposited on that date?

A. As I said before, I can't tell for sure. The custom quite frequently is to put figures any place on the deposit ticket.

Q. I see, but the purpose of it—I mean, the purpose of the deposit slip is to attempt to keep a record showing checks on the deposit slip, is that not right? Deposits by check?

A. That is the idea of making the deposit slip the way it is. [91]

Q. And that deposit slip indicates in general practice the general usage of that particular form of deposit slip, that \$400.00 was deposited by check on that particular day? In other words, a \$400.00 check was presented to the particular teller for deposit to the account that appears on the top of the slip? Is that not correct?

A. That is what is apparently shown here.

Q. Now, referring to Petitioner's Identification No. 8. I am referring to the same check in Petitioner's Identification No. 8 that you were questioned concerning—by the Petitioner's attorney. Is that the last check in that series of checks making up that identification?

(Testimony of William M. Cartwright.)

A. This is the check dated December 17, 1951, and this is the last check in this particular group.

Q. Now, would you state what date appears that that identification was cashed on?

A. December 17, 1951.

Q. Now, you referred to a ledger sheet of the account of C. P. Coughlan wherein there was a notation concerning the 17th—or the same date that that appeared, Petitioner's Identification No. 22, is that not correct?

A. You have reference to the deposit that was made in this account on the same date?

Q. Yes. Did you say that there was a deposit made on the same date? [92]

A. Yes, there was a deposit made on December 17 in the amount of \$400.00.

Q. In the amount of \$400.00? A. Yes.

Q. And was there any other deposit made on that date? A. No.

Q. And Petitioner's Identification No. 20 is the deposit slip that covers that particular deposit, is that correct? A. That is correct.

Q. Now, is there any indication that the check appearing as the last check in the series of checks making up Petitioner's Identification No. 8 had anything whatsoever to do with that deposit?

A. Other than the date there is no physical tie-up.

Q. The check is for the sum of \$1,000.00, is it not? A. Yes.

Q. The check for deposit was in the sum of

(Testimony of William M. Cartwright.)

\$400.00, is that not correct, as shown on the deposit slip, Identification No. 20?

A. I don't know if it was a check that was deposited for \$400.00.

Q. Sir, you have referred to the endorsements appearing on the back of the various checks presented to you by the Petitioner, is that not correct?

A. Yes. [93]

Q. You are not a handwriting expert, are you?

A. No.

Q. I would ask you, sir, whether the ledger sheets that you have here, purporting to be a portion of my account with your bank, is that, to your knowledge, a full ledger of all of my account with your bank?

A. No. This covers the period from September 6, 1951, to January 8, 1952.

Q. From your examination of Petitioner's Identification No. 1, which appears to be a signature card connected with that particular account, could you state whether there should be other ledger sheets?

A. Yes, there should be.

Q. At the time of the last trial did you have the other ledger sheets here?

A. I don't remember for sure. I don't think so. I think this was the only one.

Mr. Coughlan: Mr. Stevens, do you have the other ledger sheets on that particular account?

Mr. Stevens: No, that is the only ledger sheet I have which was in evidence in the former case.

Q. (By Mr. Coughlan): Sir, do I understand

(Testimony of William M. Cartwright.)

that your testimony here elicited from the Government has been concerning the files and records of the bank, as an officer of that bank and not from your own personal [94] independent recollection of any particular transaction that has occurred concerning these identifications themselves?

A. That is right. I am testifying from the records.

Q. Concerning Petitioner's Identifications Nos. 11 and 10, which purport to be photo copies made from a microfilm, did you make them yourself?

A. I don't have the identifications you refer to.

Q. Those are Petitioner's Identifications 10 and 11 which the court is holding?

(Thereupon, the documents referred to were handed to the witness.)

A. No, I didn't make them myself. I caused them to be made.

Q. Beg your pardon?

A. I caused them to be made.

Q. Would you examine them for a moment in respect to their clarity. For the record would you state your opinion concerning their clarity in respect to your knowledge of the regular printed form that the Bank of Fairbanks uses for that particular check?

A. They are not as clear as the original record.

Q. Are they considerably less clear than an original check on that particular type form?

A. In some respects, yes.

(Testimony of William M. Cartwright.)

Q. In respect to the time within which these checks were purportedly transmitted through your bank, could you state whether Phillip A. Johnson was the bank president during that time?

A. Yes, he was. [95]

Q. And he was the officer under whom you were employed? A. Yes.

Q. As an officer of that particular bank and particularly during the time covered within the scope of those checks, could you state whether or not from your memory there was some hard feelings between Mr. Johnson, other members of the Board of Directors, and myself?

The Court: Never mind answering that question. There has been no foundation laid for any such question. It might be a matter of defense, but not at this time.

Q. (By Mr. Coughlan): From your examination of Petitioner's Identification 21, which purports to be the ledger of the Raymond Silver account with your bank, could you state whether that is a full ledger of the estate account?

A. Up to May 28, 1952, yes.

Q. From the date that it was originally opened to that date it is a full detailed account?

A. Yes.

Q. From your examination of that particular ledger could you state how much moneys were deposited to the account of Raymond Silver during that period of time?

A. There were 3 deposits made.

(Testimony of William M. Cartwright.)

Q. And what were they, sir?

A. On May 19, 1951, \$552.68; on August 6, 1951, \$6,982.50; [96] and on May 19, 1952, \$1,179.90.

The Court: I presume that the Petitioner is going to offer these exhibits in evidence. Am I correct?

Mr. Stevens: Yes, your Honor.

The Court: It is not necessary to ask the witness questions like this last one as to what the record shows. The records speak for themselves.

Mr. Coughlan: Yes, your Honor. That is true. That was my last question. I merely wanted to have that for my own personal information here. That is all, Mr. Cartwright.

The Clerk: Petitioner's Identification No. 23.

### WILLIAM M. CARTWRIGHT

testified as follows on

#### Redirect Examination

By Mr. Stevens:

Q. This is Petitioner's Identification No. 23, Mr. Cartwright. Would you tell us what that is?

A. This is a portion of what we call the note blotter which is a record of payments made on notes at the Bank of Fairbanks and this particular note blotter is dated December 17, 1954.

Q. Can you find an item on the record which is connected with Mr. Coughlan?           A. Yes.

Q. What is that item?

(Testimony of William M. Cartwright.)

A. It shows a payment of \$600.00 on a note of Cornelius P. Coughlan. [97]

Q. On that date, December 17, 1951?

A. That is correct.

Q. And is that a record of your bank and note teller's blotter? A. It is.

Q. Is the record kept in the normal course of business? A. Yes.

Mr. Stevens: Your Honor, the testimony of Mr. Frey, the note teller, appears in the record at 249. It is quite lengthy and as far as the Petitioner's position is concerned we do not intend to call Mr. Frey in view of that testimony.

The Court: Did you mention the page number?

Mr. Stevens: 249, your Honor. Your witness, Mr. Coughlan.

## WILLIAM M. CARTWRIGHT

testified as follows on

### Recross-Examination

By Mr. Coughlan:

Q. Mr. Cartwright, referring to Petitioner's Identification No. 23, concerning which you were just examined. You stated that it is a portion of a note blotter. Would you explain that?

A. Well, it is a part of the note blotter for that day. In other words, there was more than one sheet.

Q. There was more than one sheet of note transactions appearing on that particular date, is that

(Testimony of William M. Cartwright.)

correct? [98]           A. Correct.

Q. What did you say the date of that was, 12/17/51?           A. December 17, 1951.

Q. From your knowledge of that particular—I will ask you this: Are you acquainted with how the note blotter is kept during the normal course of business at that bank?           A. Yes.

Q. Can one examine the note blotter and determine how any particular payment has been made?

A. As to whether it was cash or check?

Q. Yes.           A. No.

Q. Referring to Petitioner's Identification No. 8, which was the last check in that series within the identification——

The Court: This is not recross-examination. You are limited on recross to examination concerning this blotter.

Mr. Coughlan: I understand that, your Honor. I was merely going to refer to the blotter.

The Court: Very well. We will see what your question is. Go ahead.

Q. Referring to the last check contained in Petitioner's Identification No. 8, which you stated bears a sign or symbol which determines that cash was given for it——

Mr. Stevens: I don't believe the record shows that, your Honor. I believe this witness stated contrary to that. [99]

The Court: I don't recall any such thing in the testimony of this witness.



(Testimony of William M. Cartwright.)

Mr. Coughlan: Might I ask the witness if he did testify to that?

The Court: Yes, if it has a bearing on this blotter.

Mr. Coughlan: Yes, I believe so.

Q. (By Mr. Coughlan): Mr. Cartwright, does that last check in Petitioner's Identification No. 8 bear any symbol of your bank that shows that the transaction was a cash transaction, that the teller paid cash for it?

A. The teller's stamp on the face of this check does denote that it was an item for which cash was paid.

Q. Now, referring to the blotter, which is Petitioner's Identification No. 23, I believe you have already answered the question as far as that is concerned—you stated that you cannot tell from that blotter whether or not any particular check or particular cash was used to make the payment of \$600.00 that was indicated to have been paid on December 17, 1951, can you? A. That is right.

Mr. Coughlan: That is all.

WILLIAM M. CARTWRIGHT

testified as follows on

Reredirect Examination

By Mr. Stevens: [100]

Q. Is that a stamp of the cash teller or the stamp of the note teller?

A. This is a note teller's stamp.

(Testimony of William M. Cartwright.)

Q. And that stamp is the same stamp that appears upon the deposit slip and is the stamp of the person who was handling the note blotter, is that correct?      A. That is correct.

Mr. Stevens: Thank you, Mr. Cartwright.

The Court: Have you any further questions, Mr. Coughlan?

Mr. Coughlan: Yes, I do.

### WILLIAM M. CARTWRIGHT

testified as follows on

#### Rerecross-Examination

By Mr. Coughlan:

Q. Mr. Cartwright, is it not a fact that at the time that we were referring to, December 17, 1951, the Bank of Fairbanks employed tellers and that all of the tellers were ordinary tellers and transacted the business of taking and receiving deposits, making change, etc.? Each of the tellers in the bank did that, did they not?

A. All except the note teller.

Q. Did not the note teller? Was he not a regular teller also?

A. Only in transactions that were incidental to note transactions. [101]

Q. Was it not your testimony at a prior time that the note teller did the regular normal duties of the other tellers besides taking care of notes?

A. Where other transactions were tied in with the note transactions.

(Testimony of William M. Cartwright.)

Q. Then, for instance, if a person came there and wished to make a deposit in cash to his account, then he would take the deposit, would he not?

A. You mean the note teller would take it?

Q. Yes.

A. Usually only if it were tied up with the note transaction.

Q. That is what I am referring to. In this particular phase of his duties there was nothing that distinguished the note teller from the other tellers excepting that he kept up this note blotter and kept the note accounts, is that not correct?

A. That is right. He handled all the note transactions passing through the bank.

Q. And, as well as that, when a person came in on a note matter he would handle other deposits and withdrawals as well, is that not correct?

A. Yes.

Q. But is it not also a fact that there was nothing in the rules of the bank to prevent him from taking deposits otherwise?

A. That is right. There was nothing to prevent him from doing it. [102]

Q. And was it not a fact that during certain times of the month and certain times of the day that the note teller would not ordinarily be busy, whereas, the other tellers would be and he would—

The Court: Is all this material? Do we have to go into every trivial detail of the duties of these tellers?

Mr. Coughlan: I wanted just one thing clear for

(Testimony of William M. Cartwright.)

the record, your Honor, and that is in regards to the tellers there. I thought it would only take a moment at the time because of the past testimony.

The Court: It doesn't make any difference what you want to do, it has got to be relevant and material to the issues here and if it isn't it doesn't belong in the case and the court hasn't got time to listen to it.

Mr. Coughlan: Your Honor, this was testimony concerning the particular stamp that was first elicited by the Petitioner.

The Court: That doesn't open up the examination to these details. I don't know how it could possibly be relevant as to the division, subdivision of duties, as to these details in the bank.

Mr. Coughlan: Well, your Honor, it would be relevant concerning how the stamp is used and it is significant as of that particular date.

The Court: Well, it doesn't appear to me that it would be relevant in any respect. [103]

Mr. Coughlan: That is all.

Mr. Stevens: We offer into evidence Petitioner's Identification No. 1, signature card from the Bank of Fairbanks.

The Court: It may be admitted.

Mr. Coughlan: I will object to its admission, your Honor, at this time on the ground that it is irrelevant.

The Court: Overruled.

The Clerk: Petitioner's Exhibit B.

(Bank of Fairbanks signature card was marked Petitioner's Exhibit B.)

Mr. Stevens: We offer Identification No. 20, the deposit slip of December 17, 1951.

The Court: It may be admitted.

The Clerk: Petitioner's Exhibit C.

Mr. Coughlan: Objected to on the same ground.

The Court: Same ruling.

(Deposit Slip of December 17, 1951, was marked Petitioner's Exhibit C.)

Mr. Stevens: We offer Petitioner's Identification No. 22, the bank record of the account of Cornelius P. Coughlan.

The Court: It may be admitted.

Mr. Coughlan: Same objection.

The Court: Same ruling.

The Clerk: Petitioner's Exhibit D. [104]

(Bank record of the account of Cornelius P. Coughlan was marked Petitioner's Exhibit D.)

Mr. Stevens: We offer Identification No. 21 in evidence of the account of the Estate of Raymond Silver of the Bank of Fairbanks.

The Court: It may be admitted.

Mr. Coughlan: Objection, same ground.

The Court: Same ruling.

The Clerk: Petitioner's Exhibit E.

(Account of the Estate of Raymond Silver of the Bank of Fairbanks was marked Petitioner's Exhibit E.)

Mr. Stevens: We offer Petitioner's Identification No. 9, your Honor, check in the amount of \$950.00 of the Lomen Commercial Company. It has been identified as having passed through the Bank of Fairbanks by Mr. Cartwright, and the testimony of Harry G. Carlson appears at page 332 in the record. Mr. Carlson was the manager of the Lomen Commercial Company and has identified this check at length.

The Court: It may be admitted.

Mr. Coughlan: Your Honor, I object to Petitioner's Identification 9, if it goes into evidence, on the ground it is incompetent and irrelevant.

The Court: Objection overruled. [105]

The Clerk: Petitioner's Exhibit F.

(Check in amount of \$950.00 from Lomen Commercial Company was marked Petitioner's Exhibit F.)

Mr. Stevens: We offer the note blotter, or portion of the note blotter, which is Identification No. 23, identified by Mr. Cartwright as the record of the Bank of Fairbanks kept in normal course of business.

The Court: It may be admitted.

Mr. Coughlan: I object to that exhibit, your Honor, on the ground that it is irrelevant and immaterial.

The Court: Objection overruled.

The Clerk: Petitioner's Exhibit G.

(Note Blotter of the Bank of Fairbanks was marked Petitioner's Exhibit G.)

Mr. Stevens: We offer Identification No. 10, which is a photostat of the microfilm copy of check dated January 12, drawn on the bank account of the Estate of Raymond Silver.

The Court: It may be admitted.

Mr. Coughlan: I object to that exhibit on the ground it is irrelevant.

The Court: Objection overruled.

The Clerk: Petitioner's Exhibit H.

(Photostat of check in the amount of \$1,000.00 was marked Petitioner's Exhibit H.)

The Court: All of these have been identified and testified to, so you can offer them as a lot to be numbered or lettered consecutively.

Mr. Stevens: I am sorry, our practice is that they have to be admitted individually.

The Court: I don't know why we have to go over a description of each one of them. They have all been thrashed out here.

Mr. Stevens: Our last offer is Identification No. 11, your Honor.

Mr. Coughlan: I object to it, your Honor, on the ground it is irrelevant and incompetent.

The Court: Objection overruled, it may be admitted.

The Clerk: Petitioner's Exhibit I.

(Photostat of check in the amount of \$1,000.00 was marked Petitioner's Exhibit I.)

Mr. Stevens: In conformance with the court's instruction we will offer Identification Nos. 7, 19, 12, 13, 14, 15, 16, 17 and 18.

The Court: They may be admitted.

Mr. Coughlan: Your Honor, I will object to admitting them as a group and object to each and every one of them as being irrelevant and incompetent.

The Court: Objection overruled, they may be admitted. [107]

(Petitioner's Identifications 7, 19, 12, 13, 14, 15, 16, 17 and 18 were admitted in evidence as Petitioner's Exhibits J, K, L, M, N, O, P, Q, and R, respectively.)

Mr. Stevens: And I similarly offer Identifications Nos. 2, 3, 4 and 5.

Mr. Coughlan: Same objection, your Honor, as the last objection.

The Court: Same ruling. They may be admitted.

(Petitioner's Identifications Nos. 2, 3, 4 and 5 were admitted in evidence as Petitioner's Exhibits V, W, T and U, respectively.)

Mr. Stevens: Thank you, Mr. Cartwright.

(Thereupon, the witness was excused and left the stand.)

Mr. Stevens: Mrs. Bowers.



MYRTLE BOWERS

a witness called in behalf of the petitioner, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Would you state your name, please?

A. Myrtle Bowers.

Q. And where do you reside, Mrs. Bowers?

A. Fairbanks, Alaska.

Q. What is your occupation? [108]

A. Legal stenographer, secretary.

Q. For whom? A. Collins and Clasby.

Q. Will you examine Identification 6 and tell us what that is, please?

A. It is a check drawn on the account of Collins and Clasby made payable to Jack Coughlan in the amount of \$117.29.

Q. And does your signature appear on the reverse of that as endorsement? A. Yes, it does.

Q. And does Mr. Coughlan's signature also appear? A. Yes.

Q. Do you know Cornelius P. Coughlan as Jack Coughlan? A. I do.

Q. And inasmuch as your endorsement appears on the reverse of that check, would you tell us what that would mean in your normal office procedure?

A. Quite frequently when I would be going to the bank Jack would ask me to cash checks for him and bring back the cash, so that is why my signature appears below his.

Mr. Stevens: Your witness, Mr. Coughlan.

## MYRTLE BOWERS

testifies as follows on

## Cross-Examination

By Mr. Coughlan: [109]

Q. Mrs. Bowers, do you recall whether or not the checks were normally made "Jack Coughlan" or "C. P. Coughlan" at that time?

A. They were made out both ways, as I remember. I was in the habit of calling you Jack, so half of the time I am sure I made out your checks to Jack Coughlan.

Q. Yes.

Mr. Coughlan: That is all.

Mr. Stevens: We offer Identification No. 6 in evidence.

Mr. Coughlan: I object to it, your Honor, on the ground it is irrelevant.

The Court: Objection overruled. It may be admitted.

(Petitioner's Identification No. 6 was admitted in evidence as Petitioner's Exhibit S.)

Mr. Stevens: Thank you, very much, Mrs. Bowers.

(Thereupon, the witness was excused and left the stand.)

Mr. Stevens: Your Honor, Mr. McFarland is on his way up from the First National Bank and he will be here in approximately 3 or 4 minutes.

The Court: We will recess for 5 minutes.

(Thereupon, at 10:38 o'clock a.m., following a 5-minute recess, court reconvenes, and the following proceedings were had:)

Mr. Stevens: I am sorry, your Honor, Mr. McFarland couldn't be located. We will call Mr. Donhauser instead while [110] we are waiting for Mr. McFarland.

**FREDERICK DONHAUSER**

a witness called in behalf of the petitioner, was duly sworn and testified as follows

**Direct Examination**

By Mr. Stevens:

Q. Would you state your name, please?

A. Frederick Donhauser.

Q. Where do you reside? A. Stony River.

Q. Were you the administrator for the estate of Raymond Silver? A. I was.

Q. How did you secure that appointment?

A. Through Clinton Stewart.

Q. What was Mr. Clinton Stewart at that time?

A. He was commissioner.

Q. Did you hire an attorney?

A. Yes, I did.

Q. Who was that attorney?

A. Well, I started off with Parrish and then hired Jack.

Q. And did Mr. Coughlan prepare this petition, which is Exhibit P, for you? A. Yes. [111]

Q. Is your signature on that? A. Yes.

Q. And your signature was notarized?

(Testimony of Frederick Donhauser.)

A. Yes.

Q. By Mr. Coughlan?

A. I don't remember whether it was by him or by his secretary. I guess—it says here by him.

Q. To your knowledge did his secretary ever sign his name and use his seal?

A. I don't know.

Q. I will hand you Petitioner's Exhibit W, which is your own oath as administrator. Is that your oath?

A. That is my oath.

Q. And does your signature appear on it?

A. That is my signature.

Q. Was Mr. Coughlan your attorney at that time?

A. Yes, he was.

Q. I hand you Exhibit U, Petition for Final accounting, and the last page purports to be your signature. Could you tell us, is that a signature of yours?

A. Well, could be. I don't know.

Q. You print your name, do you not, Mr. Donhauser?

A. How do you mean?

Q. Your normal signature is printed?

A. No, I write it. [112]

Q. Was Mr. Coughlan representing you in January of 1952 in connection with the Estate of Raymond Silver?

A. Yes, he was.

Q. And did you go to his office to prepare the documents to wind up the Estate?

A. Yes, I did.

Q. And did you sign documents which he told you were necessary to wind up the Estate?

A. I believe I signed some, yes.

(Testimony of Frederick Donhauser.)

Q. You have no independent recollection at this time of signing this document, is that your statement?

A. No. May I see it? I recognize this document, but I don't know whether it was this one or—well, these figures I am not sure—no, I couldn't swear to it.

Q. I hand you Government's Identification 8, consisting of 5 checks——

Mr. Coughlan: Is that identification or an exhibit at the present time?

Mr. Stevens: Identification.

Q. Those 5 checks purport to be signed by you and drawn upon the account of the Estate in which you were the administrator, payable to Mr. Coughlan, and in the 5 checks is a check for \$1,000.00. Did you draw a check payable to Mr. Coughlan in the amount of \$1,000.00 on that account?

A. I don't remember. I don't think I did, but I am not [113] quite sure. It depends on what had been paid to him before that.

Q. Well, I hand you Government's Exhibit H, which is a check in the amount of \$1,000.00, similar to the check you have in your hand, dated the 12th day of January, 1952. And I hand you Government's Exhibit I, which is another check in the amount of \$1,000.00, dated in March, 1952, and drawn on the same account. Did you authorize the withdrawals of those 3 \$1,000.00 checks payable to Mr. Coughlan personally?

A. No, I didn't.

Q. I hand you Government's Exhibit F, which

(Testimony of Frederick Donhauser.)

is a check in the amount of \$950.00 from the Lomen Commercial Company. Were you acquainted with a truck which was located in Nome in connection with this Estate?      A. Yes, I was.

Q. And were you acquainted with proceedings leading to the sale of the truck?

A. I gave Jack permission to sell it, yes.

Q. And did you receive payment for the truck?

A. No.

Q. To your knowledge did you ever discuss the payment of the truck with Mr. Coughlan?

A. Beforehand I think—oh, just before—I think it was in April or May before I went down the road—maybe it was in December, I don't know—I mean, in October, '51. I mean, I told him to get rid of it. [114]

Q. Did you authorize him to accept the \$950.00 and use the money personally?      A. Oh, no.

Q. Did you prepare checks for Mr. Coughlan to use in disbursing the assets of the Estate?

A. I signed a number of blank checks.

Q. And those had no figure or no payee written in on the checks at all?      A. No.

Q. And how did you happen to do that, Mr. Donhauser?      A. Well, on his advice.

Q. Were you to leave the area at that time?

A. No, I think this is when—well, it first started, then I did leave the area in October, I believe, of '51—October or November, I am not quite certain of that, and that is when I gave Jack power of attorney.

(Testimony of Frederick Donhauser.)

Q. Did you give him a Power of Attorney at some time?      A. Yes.

Q. To sign your name in connection with this Estate?      A. Yes.

Mr. Stevens: We offer the 5 checks, Government's Identification 8, your Honor.

The Court: It may be admitted.

Mr. Coughlan: They will be objected to upon the grounds they are incompetent and irrelevant. [115]

The Court: Objection overruled.

The Clerk: Petitioner's Exhibit X.

(Five (5) checks were marked as Petitioner's Exhibit X.)

Mr. Stevens: I call the court's attention to the fact that Mr. Donhauser was on the stand for quite some length of time during the preceding trial. His testimony appears at page 73; he was recalled for cross-examination at page 118; there was some re-direct examination at page 124; he was recalled again at page 424, and his testimony appears for some 30 pages thereafter. Your witness, Mr. Coughlan.

**FREDERICK DONHAUSER**

testified as follows on

**Cross-Examination**

By Mr. Coughlan:

Q. Mr. Donhauser, do you recall when you first procured my services in respect to the Raymond Silver Estate?      A. Yes.

(Testimony of Frederick Donhauser.)

Q. In relation to the time that you procured my services in that respect when was it that you state that you wrote blank checks and left them with me?

A. That was at the beginning, or when the Estate first started, then I think that night I left for Outside I wrote some also. That was—well, I don't know, October or November. [116]

Q. And do you have a clear recollection of that?

A. The first time very clear, yes.

Q. Do you recall what those checks were left for?

A. To carry on the business of the Estate.

Q. Do you recall specifically what that particular business was?

A. Oh, I think there was a bond and there was the funeral expenses and——

Q. They were the regular normal bills that were approved by you to be paid by the Estate?

A. Yes.

Q. And were you aware of how many of those bills you had examined and determined were just debts of the Estate?

A. I believe so, yes.

Q. So, at the time you knew how many checks would be needed, is that not correct?

A. Oh, no.

Q. To your knowledge have those bills been paid?

A. I think everything was paid up, yes.

Q. Do you recall whether or not you gave me any checks over and beyond what the bills of the Estate were?



(Testimony of Frederick Donhauser.)

A. What do you mean "gave me any checks"? Blank checks?

Q. Well, any kind of check?

A. Well, there were a number of checks that were signed by myself. [117]

Mr. Coughlan: Mr. Stevens, do you have those checks here that were paid to the bondsmen, to Jessen's Weekly, the funeral parlor, and so on?

The Court: Unless they can be identified they were the checks that were left in blank—

Mr. Coughlan: Yes, that is what I intend to do, your Honor. Do you have them, Mr. Stevens?

Mr. Stevens: To my knowledge I don't, Mr. Coughlan. I believe they were all returned to you, were they not?

Mr. Coughlan: Returned to me? There has been nothing returned to me in any way, form or shape.

Mr. Stevens: You are most welcome to look over the matters we have here to see if you want any of it. To my knowledge we don't have the checks.

Mr. Coughlan: They should in all probability be in the Estate file as a portion of the final account.

Mr. Stevens: I believe the documents in—there are some documents involved in this Estate file.

Q. (By Mr. Coughlan): Mr. Donhauser, were you in the Territory of Alaska in January of 1952?

A. No, I wasn't.

Mr. Stevens: Mr. Coughlan, there does appear to be several checks here payable to Jessen's Weekly, Fairbanks Insurance Agency, Mr. Donhauser and Martin Shafer, if you would like to have those. [118]

(Testimony of Frederick Donhauser.)

Mr. Coughlan: Yes, if I could, please. (The documents were handed to Mr. Coughlan.) I will ask that these be marked for identification, please.

The Clerk: All together or individually?

Mr. Coughlan: Either one.

The Clerk: Respondent's Identification B.

Mr. Coughlan: Would it be proper, your Honor—oh, I would like this—where we have several checks together, to number the checks, for clarity in the record, under B, say, for instance, 1, 2, 3, 4 and 5 so when we refer to any particular one it would be clear.

The Court: If there is going to be testimony concerning each of the checks, of course, they should be marked separately, but right here I might as well warn you I am not going to permit examination of the details of transactions represented by these checks because it would be wholly without value until first it is shown the number of checks that were issued by the witness in blank and then what they were used for, otherwise, we would just simply be wasting hours exploring something of no pertinency.

Mr. Coughlan: I understand that, your Honor.

Q. (By Mr. Coughlan): I hand you Respondent's Identification B and ask you to examine it. Have you completed your examination?

A. Yes.

Q. Could you state whether or not those are the checks [119] that you are referring to that were left with me, or were a portion of those the checks that you state were left with me?

(Testimony of Frederick Donhauser.)

A. Well, I think all of them were left. I think they were the ones that were left with you.

The Court: Were they all that you signed in blank?

A. They appear to be so.

The Court: It isn't whether all of those were signed in blank, but did you sign any more than those you have in your hand?

A. I believe so, yes.

The Court: So we are back to where we started from. The purpose, as I see it, of introducing evidence concerning the leaving of the checks by the administrator signed in blank, is of showing that they could have been used, because they already had his signature, for improper poses, and so that cannot be rebutted by accounting for any less than the number of checks he left signed.

Mr. Coughlan: Your Honor, at this time I was only referring to those particular checks that he now has and has now identified in order to determine whether they were the checks that he had mentioned when responding to a question propounded by the United States Attorney and he has stated that they are.

The Court: He answered it. I am just commenting on the fact I am not going to permit, as I have said before, an examination as to each transaction represented by the checks in view of [120] the fact they all are not accounted for at this time.

Mr. Coughlan: Your Honor, I am not asking for anything of that type.

(Testimony of Frederick Donhauser.)

Q. (By Mr. Coughlan): Mr. Donhauser, referring to your memory concerning the number of checks that you purport to have left with me, do you have any recollection as to how many checks were left?

A. I'd say, oh, between 10 and 20 or 15 and 20. I don't know. There were a number of them, I think.

Q. You have no clear recollection as to the exact number, is that correct? A. No, I don't.

Q. Now, in respect to what was formerly Identification 8, the checks that you previously examined, which I believe have now been entered into evidence as an exhibit—what is that exhibit, please?

The Clerk: X.

Q. In respect to Petitioner's Exhibit X you stated that you do not know if you wrote any portion of those checks?

A. The photostatic copies there?

Q. Yes, that is what I am referring to—no, I am referring to what was Identification 8 while you were under examination by the Petitioner and which is now Exhibit X.

A. It appears to be my signature.

Q. Have you examined all of them? [121]

A. The signatures look similar. I doubt if I could have written them because I wasn't here—I mean, some of them.

The Court: How many do you have there?

A. I have 5 here, and 4 here.

(Testimony of Frederick Donhauser.)

Q. Do you recall any other bills that were payable by this Estate that you do not have checks for at the moment?

A. No, because I don't know what all these checks are for.

Q. In respect to the signatures on Petitioner's Exhibit X, you say they look similar to your signature?

A. They all appear to be, yes.

Q. Is there anything about them that makes it appear that they are not your signature or makes you doubt but what they are your signature?

A. I don't think so.

Q. Referring to Exhibit F, which is a Lomen Commercial Company check, and the testimony that you gave in respect to that, were you in Fairbanks at the time that the request was received for the purchase of that particular vehicle?

A. The purchase from Lomen?

Q. Yes, were you in town at the time a letter was received in respect to that?

A. I believe so. I don't know the date, but I think I remember you mentioning something about it.

Q. During the summer of 1951 and into approximately October or the first of November do you recall where you were employed? [122]

A. Yes.

Q. Where were you employed at that time?

A. Ralph Dodson.

Q. Was that located in the town of Fairbanks?

A. No, he had a pit about 3 miles outside of town.

(Testimony of Frederick Donhauser.)

Q. In respect to the exhibits that you identified, that were referred to you concerning the Raymond Silver Estate, do you have any independent recollection concerning the date that they were first seen by you? A. For which year?

Q. Well, during any of the years?

A. Yes, when you first started it. Then I think in May because that is when the sale of the truck was. That is when I spoke to your secretary about it.

Q. Referring to page 3 of Petitioner's Exhibit K, paragraph 6, do you notice a portion that states "voucher number"? Do you recognize the items that appear there? A. Yes.

Q. Do you recognize them as being connected with the Raymond Silver Estate? A. Yes.

Q. Now, referring to page 4 of the same exhibit, in paragraph 14, do you notice another set of figures? A. Yes.

Q. Do you recognize the figures and what they refer to? [123]

A. Well, I assume it is all for the Estate, yes.

Q. Now, do you recall that as being a portion of the Estate? A. Well, yes.

Q. Now, in respect to Petitioner's Exhibit M. Do you recall whether or not you were in the Territory of Alaska November 1st, 1955?

A. I am not sure if I was or not.

Q. Referring to Petitioner's Exhibit L. I will ask you whether you were in Fairbanks on November 1st, 1951?

(Testimony of Frederick Donhauser.)

A. Well, I don't know. I never saw these before.

Q. Do you recall the transaction?

A. No, I don't recall the transaction.

Q. You don't recall it?

A. No, that was the thing when I came back. That is when it first came up. When I asked your secretary she said she was going to write the note.

Q. Bearing in mind the Order and Approval of Sale, which are Petitioner's Exhibits M and L, and the time that they were made and filed, do you recall whether other portions of the Estate had been taken care of by you personally at that time?

A. Well, how do you mean personally?

Q. What I am referring to there is: You state that you do not recall that Order and Approval of Sale on those particular dates. Now, prior to that time, and if I understood your former [124] testimony correctly, you stated that you gave me permission to sell the truck; that there had been a discussion between you and myself concerning the sale of that particular truck?

A. After coming back from Nome, yes.

Q. Yes. Now, in respect to that and in order to orient you in the Estate matters, do you recall that our discussion at that time concerned the inventory price of the truck?

A. No, because I thought that was when I came back. I went to Lomen and that was the price, \$950.00.

Q. Yes.

A. But I think it was in May of '51.

(Testimony of Frederick Donhauser.)

Q. Then at that time or shortly after that trip that you made do you recall the inventory being filed or while you were there at Nome do you recall talking to a Mr. Polette concerning the truck and other properties there?

A. I recall, yes. I talked to him, yes, but I don't remember if it was——

Q. Was Mr. Polette one of the appraisers of the Estate?      A. No. No, it was his father.

Q. That was Antonio Polette?

A. The old man; the father.

Q. Yes, Antonio Polette. Is that not what one of the checks was for that you noted here; that you recalled here?      A. Yes.

Q. Antonio Polette, Alvin Polette and Martin Shafer? [125]      A. Uh-huh.

Q. Now, as I understand it, you testified to the Petitioner that you engaged my services to obtain the administration of this particular Estate; that you then had occasion to leave town after you had completed a certain portion of the administrator's duties and that you left a certain number of checks here with me. Is that not correct?

A. That was in October of '51.

Q. In October of '51?

A. Well, are you talking about October or May?

Q. I am talking about May at the present time.

A. Yes, that is right.

Q. And how many checks would be accounted for in this number here?      A. 9.

Q. 9 checks. How many would be accounted for



(Testimony of Frederick Donhauser.)

in this number here?       A. 4.

Q. That would mean 13 checks accounted for, is that correct?       A. Yes.

Q. Mr. Donhauser, the voucher numbers shows this account that you have been referring to——

A. I never saw that final accounting until in August of '52, or I think it was after that.

Q. But you recall the matters in there from the prior [126] transactions to that, do you not? Do you not recall, for instance, the probate fees?

The Court: Well, I think there is no materiality to the items that are mentioned in the accounting. The only reason that evidence was introduced, as it appears to me, is the connection of his testimony as it appears right now, and there is nothing about the final accounting until later.

Q. Do you recall how many checks you, yourself, received from the Estate?

A. I don't recall the number. It was about \$330.00 I think, that I received from the Estate.

Q. Do you recall whether it was in more than one check?

The Court: How is that material now?

Mr. Coughlan: Beg your pardon?

The Court: How is that material?

Mr. Coughlan: I am referring to the number of blank checks, your Honor, that he stated that he left. He has already accounted for 13 checks.

The Court: Well, this is getting too remote now. Don't answer the question. Go to something else.

(Testimony of Frederick Donhauser.)

Q. Now, you stated that you gave me a Power of Attorney? A. Yes.

Q. Was it necessary to write blank checks for me after you had given me a Power of Attorney?

A. I don't know. [127]

Q. Have you ever heard of my having used a Power of Attorney to do any transactions, any business in your behalf? A. No.

Mr. Coughlan: That is all.

Mr. Stevens: Just one minute.

### FREDERICK DONHAUSER

testified as follows on

#### Redirect Examination

By Mr. Stevens:

Q. You stated that you gave Jack the right to sell the truck? A. Yes.

Q. This is Petitioner's Exhibit T, which is the petition to sell the truck and is signed by C. P. Coughlan, attorney in fact. Did you tell him to go ahead and get permission to sell the truck or did you tell him to go ahead and sell the truck or what did you tell him?

A. I don't remember. I mean, I thought I told him to go ahead and sell it.

Q. Did you understand that a petition had to be made to the court to sell it?

A. This is the first time I have ever seen this piece of paper here, and lots of others, and it wasn't a G.M.C., it was a Cornbinder. I never saw this. [128]

(Testimony of Frederick Donhauser.)

Q. But you had given Mr. Coughlan Power of Attorney to use in connection with the Estate?

A. Correct.

Mr. Stevens: Your witness, Mr. Coughlan.

Recross-Examination

By Mr. Coughlan:

Q. With respect to this Exhibit T; after you retained my services in connection with this Estate did you have occasion to come to my office at different times to examine the Estate file?

A. Yes, I did.

Q. Did you examine the Estate files at those times?

A. Sometimes I did and sometimes I didn't.

Q. Do you recall having examined the Estate files on or near the time that this sale took place?

A. No, I don't—I might have done it, but I don't remember it.

Q. You have no independent recollection of examining the files at that time?

A. Not at that particular time, no. I do know the last time I saw you I didn't before I went out.

Q. Beg your pardon?

A. The last time I saw you in '51 I did not examine them. [129]

Q. You did not examine the Estate files at that time? A. That is right.

Q. Do you recall when, prior to that?

A. No, I don't recall.

(Testimony of Frederick Donhauser.)

Q. Did you examine the Estate files after the date of that sale?      A. When I came back, yes.

Q. Did you note that the files disclosed the sale?

A. There was—I don't know when I came up in '52 and saw that the truck had been sold and that there were no funds. That is when I asked your secretary where the check was and I didn't see you after that. You weren't there.

Q. Yes, but you examined them at that time?

A. In '52, yes.

Q. And you examined them in my office?

A. Yes.

Q. And did you notice from the file then at that time, if I understand your testimony correctly, that the sale of the truck had been accomplished?

A. The sale had been, yes.

Q. And it had been accomplished according to these papers?

A. I don't recall seeing those papers. It was through some correspondence in the file that indicated that the truck had been sold, but it wasn't those particular papers.

Q. It showed up clearly in the file? [130]

A. That the truck had been sold, yes.

Q. And when was it that you examined it?

A. I think it was either in April or May. I don't remember.

Mr. Coughlan: That is all.

Mr. Stevens: Thank you, Mr. Donhauser.

(Thereupon, the witness was excused and left the stand.)

Mr. Stevens: Mr. Hufford.

ERNEST M. HUFFORD

a witness called in behalf of the petitioner, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Would you state your name, please?

A. Ernest M. Hufford.

Q. Where do you live? A. 314 Cushman.

Q. And what is your business?

A. Banking.

Q. In what respect; which bank?

A. First National.

Q. What is your position at the bank?

A. Assistant Cashier.

Q. What are your duties as Assistant Cashier in relation to the records of the First National [131] Bank?

A. I have access to all records.

Q. I hand you Petitioner's Identification No. 24 and would you tell us what that is, please?

A. It is a copy of our original account of Cornelius P. Coughlan and shows entries of deposits and disbursements.

Q. And is that a record kept in the normal course of business in your bank? A. It is.

Q. And it is in the normal course of business to keep such a record in your bank?

A. That is true, yes.

(Testimony of Ernest M. Hufford.)

Q. I hand you Government's Identification I, which is a photostat of a copy of a check. By examining that exhibit, Mr. Hufford, can you tell from the reverse side of the check whether or not the check was ever passed through your bank?

A. It has April 4 of '52. It went through our bank, yes, sir, if I read this correctly. It bears our endorsement.

Mr. Coughlan: I can't hear the witness, your Honor.

A. It bears our endorsement of April 4, 1952.

Q. And is that what is known as a cash endorsement or what type of endorsement is it?

A. It is a check stamp endorsement.

Q. Would you examine the Identification that you previously had, 24, and tell us whether or not you can locate the transaction involving Exhibit I with Identification 24? [132]

A. It shows it was deposited to this account.

Q. There was a check in a similar amount deposited to the account of Cornelius P. Coughlan on that date in your bank?

A. That is correct.

Q. I hand you Government's Exhibit H and ask you to examine the reverse of that.

A. I can't quite make out the month; it is 14—it is too dim for me. It is our endorsement, but I can't make out the month.

Mr. Coughlan: I can't hear what the witness is saying, your Honor.

The Court: You will have to speak louder.

A. I can't make out the month on this document.

(Testimony of Ernest M. Hufford.)

Q. The check, on the face of it purports to be made out on 1/12/52 and the stamp on the reverse side is on the 14th of some month?

A. That is true.

Q. Is it your bank?

A. It is our bank stamp, yes, sir.

Q. A clearance endorsement, is it not?

A. Same thing.

Q. I hand you Government's Identification 13 and call your attention specifically to January 14, 1952. Would you tell us whether there is an entry there which would correspond to a similar check as Government's Exhibit H? [133]

A. There is, yes, sir.

Q. And a check in the amount of \$1,000.00 did pass through the account?

A. A check of \$1,000.00 has.

Q. Deposited to——

A. Cornelius P. Coughlan.

Mr. Stevens: Your witness, Mr. Coughlan.

ERNEST M. HUFFORD

testified as follows on

Cross-Examination

By Mr. Coughlan:

Q. Now, Mr. Hufford, referring to Petitioner's Identification 24, would you state whether that is the full account?

The Court: It doesn't make any difference if it

(Testimony of Ernest M. Hufford.)

was the full account or not. It was admitted for the purpose of showing these 2 checks. What the rest of the account may show is immaterial as far as this witness is concerned.

Q. Would you state whether or not, in your examination of your ledgers, whether there was more than one account or different accounts for Cornelius P. Coughlan at the same time?

The Court: Never mind answering that question. That comes within the scope of the last ruling. This witness was called for the purpose of testifying to 2 checks in connection with the Exhibit for Identification 24 which shows that part of [134] the account that sets forth these 2 checks. Your cross-examination is limited to those 2 checks in the account.

Q. Now, referring to Petitioner's Exhibit H, did you state that there appears to be on Petitioner's Identification 24 a ledger marking that same date or approximately the same date?

A. January 14 we have it, yes, sir.

Q. January 14. From your examination of Petitioner's Identification 10 are you able to ascertain whether that endorsement was made in the month of January of that particular year?

A. Well, this just isn't too clear here, but by the date of January 12 you naturally think it wouldn't be more than 2 days in a local bank transaction. It would be in line.

Q. Would it be stamped on the same day?

A. We stamp it the same day we receive it.



(Testimony of Ernest M. Hufford.)

Q. From your examination of Petitioner's Exhibit H can you see on your endorsement the month?

A. No, I can't.

Q. Referring to Petitioner's Exhibit I can you ascertain whether or not any mark appears on the face of it that would indicate that cash had been paid for it?

A. If it had been in cash it would have been stamped with a "cage" stamp. This would have been deposited.

Q. And is that a cage stamp you are referring to? Is that like the little mark that appears on Petitioner's Exhibit F?

A. That is true, yes, sir. It doesn't appear on this one. [135]

Q. Referring to that particular reproduction, if there were such a stamp on it, particularly referring to the reverse side of it where you see a stamp impression from your bank, do you think a hand stamp might possibly have been on there and is not visible at the present time?

A. I don't think so.

Q. Is there any indication on either of these exhibits that would show to whom the transaction took place, that is, Petitioner's Exhibits H and I? Is there any indication on the records that would indicate that any particular teller or member of the bank handled the transaction?

A. I don't have that record with me. There would be, yes.

Q. But none appears?

A. None appears on the check, no, sir.

(Testimony of Ernest M. Hufford.)

Mr. Coughlan: That is all.

Mr. Stevens: We move the admission of Identification No. 24.

Mr. Coughlan: Objected to, Your Honor, as incompetent and irrelevant.

The Court: Objection overruled. It may be admitted.

The Clerk: Petitioner's Exhibit Y.

(Account of Cornelius P. Coughlan with the First National Bank was marked Petitioner's Exhibit Y.)

Mr. Stevens: Thank you, Mr. Hufford. [136]

(Thereupon, the witness was excused and left the stand.)

Mr. Stevens: Your Honor, we were not aware that these deposit slips Mr. Hufford mentioned to Mr. Coughlan may be available and he has stated he will attempt to find them during the noon hour and call my office.

The Court: But why is it material to produce these deposit slips?

Mr. Stevens: I believe it would be material, Your Honor, because the back of the one check does not state clearly it was January. It shows the date 12/52, but it does not show the month. If we can locate that slip to show it was January 12.

The Court: I have another question. Are these particular checks going to be disputed?

Mr. Coughlan: Yes, Your Honor.

The Court: Very well. Then you may bring in this other evidence to which you refer.

Mr. Stevens: Your Honor, we have the deposition of Clarence E. Bowen, taken in Washington, D. C., and the deposition is before the court. I am not familiar with the way the court wishes to have depositions presented. The deposition was taken on written interrogatories presented by myself and cross-interrogatories presented by Mr. Coughlan.

The Court: I have read the deposition so all you need to do is offer it in evidence.

Mr. Stevens: We do offer it. [137]

Mr. Coughlan: I am going to object for the reason the rules and procedure have not been complied with in the making and introducing of that evidence.

The Court: Objection overruled. It may be admitted.

The Clerk: Petitioner's Exhibit Z.

(Deposition of Clarence E. Bowen was marked Petitioner's Exhibit Z.)

Mr. Stevens: Your Honor, we would like time to allow Mr. Hufford time to search for that one slip.

The Court: You have no other evidence to put on at this time?

Mr. Stevens: That finishes the Government's evidence. I am sorry we over-estimated our case.

The Court: Well, we will recess to 1:30.

(Whereupon, at 11:45 o'clock a.m., court continues the cause to 1:30 o'clock p.m. of the same day.)

(At 1:30 o'clock p.m., counsel for petitioner being present and counsel for the respondent being present, the trial of said cause was resumed.)

Mr. Stevens: Mr. Hufford. [138]

ERNEST M. HUFFORD

a witness recalled in behalf of the petitioner, and having previously been duly sworn, testified as follows:

The Clerk: Petitioner's Identifications Nos. 25 and 26.

Mr. Stevens: These are 2 documents you have never seen, Mr. Coughlan. Would you like to see them?

(The documents were handed to Mr. Coughlan.)

Direct Examination

By Mr. Stevens:

Q. Mr. Hufford, I hand you Identification 25 and rehand you Petitioner's Identification 24. Now, would you tell us what 25 is?

A. 25 is a deposit made by C. R. Coughlan for \$1,000.00.

Q. Could that be C. P.? A. C. P., yes.

Q. And what is the date that appears thereon?

A. It shows January 12, 1952.

Q. And can you ascertain from that what type of transaction was involved, whether it was cash or check?

A. It is listed here as a check.

(Testimony of Ernest M. Hufford.)

Q. Is this Identification 25 a record which would be kept in the normal course of your business in connection with the depositors account?

A. That is true.

Q. I hand you Petitioner's Identification 26 and ask you [139] to state what that is, please?

A. It is a deposit, this time written out Cornelius P. Coughlan, on April 4, for \$1,000.00, listed as a check, page 9. 7 that one is. The other one is 9.

Q. And is Identification 26 a record kept in the normal course of your business as a banking institution? A. It is.

Q. And is it your normal course of procedure in your business to keep records such as 25 and 26?

A. We are required to by law.

Q. And you have had those preserved in your bank until you produced them here today?

A. Correct.

Q. Now, can you connect these 2 transactions, 25 and 26, with the entries on Identification 24?

A. 25 is 2 days different, but it could have been at a late hour or on a Saturday, and the other one is identical, the same date.

Q. And what is that date, on the second one?

A. April 4 and corresponding deposit April 4.

Q. And the entry on January 14, 1952, is 2 days off of the—— A. Deposit ticket.

Q. ——deposit ticket and the check, which is Exhibit H, is that correct? [140]

A. That is right, yes, sir.

Q. Mr. Hufford, if January 12, 1952, fell on a

(Testimony of Ernest M. Hufford.)

Saturday, would the normal course of your procedure be to enter the transaction on the records on Monday?

A. It should still bear the date of Saturday, but sometimes they mess up on dates.

Q. Then it could have happened that it would be entered on the 14th, which is the following Monday?

A. That is right.

Mr. Stevens: We offer the 2 deposit slips in evidence as business records of the First National Bank of Fairbanks.

The Court: They may be admitted.

The Clerk: Petitioner's Identification 25 is Petitioner's Exhibit AA and 26 is BB.

(2 deposit slips of the First National Bank of Fairbanks was marked as Petitioner's Exhibits AA and BB.)

Mr. Coughlan: I will object to them, your Honor, on the ground that they are irrelevant and incompetent in this action.

Mr. Stevens: Your witness, Mr. Coughlan.

ERNEST M. HUFFORD

testified as follows on [141]

Cross-Examination

By Mr. Coughlan:

Q. Mr. Hufford, did you state that one of those deposit slips indicated that it was placed with the bank on a Saturday?

A. I didn't mention Saturday, no, sir.

(Testimony of Ernest M. Hufford.)

Mr. Stevens: You misunderstood, Mr. Coughlan. I looked at the court's calendar for 1952 and ascertained the 12th was a Saturday, then phrased my question to Mr. Hufford.

Mr. Coughlan: That doesn't show in the record, does it, otherwise?

Q. (By Mr. Coughlan): Did you not answer that a particular date fell on a Saturday in 1952, namely, the 12th day of January or the 4th day of April?

A. I didn't check that, no, sir.

Q. But you have noticed a difference in the dates?      A. True.

Q. Referring to Petitioner's Exhibits AA and BB you note where both deposits are to the credit of the same account?

A. Well, one is the initials C. P. and the other one is spelled out Cornelius P. Coughlan.

Q. While you were checking the accounts for these particular papers did you note whether or not there were 2 separate accounts, one for C. P. Coughlan and another with your bank for Cornelius P. Coughlan and another office account as Cornelius P. Coughlan?

A. I did not, but it would go to the same account. [142]

Q. Even though within your bank there would be 2 different accounts kept under 2 different names?

The Court: There is no use in asking these questions.

(Testimony of Ernest M. Hufford.)

Mr. Coughlan: Your Honor, there has been some reference made to the transcript in 1651 Criminal

The Court: Whether or not 2 accounts were maintained does not depend upon any transcript. Now, if there is——

Mr. Coughlan: Yes, Your Honor, there was more than 2 accounts maintained in that bank by myself at that time.

The Court: Well, if there is 2 accounts or more kept, of course, the question would be proper, but otherwise there is no use in speculating on what would be done if there were more.

Mr. Coughlan: No, I was not making this a hypothetical situation, Your Honor.

The Court: Go ahead.

Q. (By Mr. Coughlan): In respect to Petitioner's Exhibit AA, do you note whether there is a date on it? A. I find the date January 12, 1952.

Q. And is that written in?

A. It is stamped in with a cage stamp. That might not have been changed. I don't know.

Q. Beg your pardon?

A. Sometimes the tellers forget to change their date stamp. This could have been an earlier transaction and it shows [143] the 12th, but the entry on the ledger sheet shows the 14th.

Q. Normally if they were for the same transaction would they show on the deposit slip and the account ledger of the account as the same date?

A. They should, yes, sir.

Q. Referring to Petitioner's Exhibit AA. From



(Testimony of Ernest M. Hufford.)

your experience is that the same stamp or the same type of stamp that the bank ordinarily utilizes?

A. You mean teller's stamp?

Q. Yes.           A. It is.

Q. What is the name of the account that appears on Petitioner's Exhibit——

The Court: It speaks for itself, so you don't have to ask him to repeat something——

Mr. Stevens: It is on the bench, Mr. Coughlan.

Mr. Coughlan: ——Y.

The Court: I said, the exhibit speaks for itself so it is unnecessary to ask that question.

Mr. Coughlan: I was just referring to it for the record.

Q. (By Mr. Coughlan): What is the name of that particular account that appears on the ledger?

A. Cornelius P. Coughlan. [144]

The Court: That is just the question that I said not to ask him. It speaks for itself and I don't want the time of the court taken up this way. The only question here is whether you were credited and whether it was in the name of one account or 2 or 3 doesn't make any difference.

Q. Now, Mr. Hufford, your testimony concerning these particular matters is not from personal knowledge, is it? You are merely stating that they are records of the bank, is that not correct?

A. Yes, sir.

Mr. Coughlan: That is all.

Mr. Stevens: Thank you, Mr. Hufford.

(Thereupon, the witness was excused and left the stand.)

Mr. Stevens: We have nothing further, Your Honor, as far as the Petitioner's position is concerned.

The Court: You may proceed with the defense.

Mr. Coughlan: Call Mr. Byers.

### ROBERT D. BYERS

a witness called in behalf of the respondent, was duly sworn and testified as follows:

#### Direct Examination

By Mr. Coughlan:

Q. Would you state your full name, please?

A. Robert D. Byers. [145]

Q. How long have you resided in the Territory of Alaska, Mr. Byers?      A. 16 years.

Q. What was your occupation during the month of April, 1952?

A. Operating Certificated Air Service in Fairbanks to Tanana, Nenana and Rampart, Hot Springs.

Q. Recalling the month of April, 1952—strike that. Have you ever seen me before?      A. Yes.

Q. Do you recall whether or not you had seen me during the month of April, 1952?

A. During that month—I think it was in April—it was during the Nenana Jaycee's convention you flew to Nenana with me to this convention.

(Testimony of Robert D. Byers.)

Q. Do you recall whether there was anyone else flying there at the time?

A. I carried several people down to the same convention.

Q. Do you recall whether or not I arrived there on the day of the convention; on the day that the convention started?

A. I don't remember whether it was the day it started or the day before, but I took you down and a couple of other fellows and the next day I took another load of people down and stayed overnight.

Q. I can't hear you, sir.

A. I took you and a couple of other fellows to Nenana one [146] day, I don't remember whether it was the day it started or the day before it started, and the next day I took another load of people to Nenana and stayed overnight and brought another load back.

Q. Do you recall offhand how long that convention lasted?

A. No, I don't. I think it was 3 days.

Q. Do you recall whether a person by the name of Jowel Buffington flew down in the same plane with me?

The Court: What has all this got to do with this case?

Mr. Coughlan: Your Honor, in respect to the date that the checks were alleged to have been——

The Court: You want to prove you were somewhere else?

Mr. Coughlan: That is correct.

(Testimony of Robert D. Byers.)

The Court: Prove it without going into all these details. He says you were in Nenana that day. That is enough.

Q. With respect to the convention that you have been testifying concerning, did you fly me back to Fairbanks after the convention?

A. Could I counter that, your Honor, with another question to refresh my memory?

The Court: Yes.

A. Did you come back with Bob Reeves?

Q. No, I came back with you, is what I was referring to, but I don't know who the persons were in the plane.

A. I don't remember then. I remember bringing 5 people back and among them was Bob Reeves, president of the National [147] Jaycee's. I can't recall, Jack, whether you were with us or not.

Q. And when was that that you flew that plane load back in respect to the beginning or end of the convention?

A. It was the day after they held their banquet. It was the last day of the convention. The convention was adjourned at midnight the night before we came back.

Q. I understand your testimony to be that you don't recall the date of the convention?

A. No, I don't remember the exact date.

Q. Have you had an opportunity to check your flight log for that time in order to ascertain the date of the ticket?

A. No, I haven't had a chance to check them.

(Testimony of Robert D. Byers.)

Q. Would that be available to you if you had had time to do so?

A. I think I could locate it, yes.

Mr. Coughlan: That is all.

ROBERT D. BYERS

testified as follows on

Cross-Examination

By Mr. Stevens:

Q. Do you recall what day the convention started down there?

A. No, I don't know the exact day.

Q. Do you know whether or not the people you flew down there went down on the first day of the convention? [148]

A. I don't remember whether they went down on the first day or the day before the convention started. It seems to me they went down on the day the convention opened.

Q. What time did you leave Fairbanks, if you recall?

A. I don't remember that now. I think it was in the forenoon sometime.

Q. Did you leave before 10:00 o'clock?

A. I don't remember exactly. To the best of my recollection it was about 10:00 o'clock.

Q. But you don't recall whether it was the first or the 10th of April? A. No, I don't.

Mr. Stevens: No further questions.

## ROBERT D. BYERS

testified as follows on

## Redirect Examination

By Mr. Coughlan:

Q. But you do recall it was the Junior Chamber of Commerce All-Alaska Convention?

A. That is right. That was the purpose of the flight.

Q. And do you recall, in respect to the time schedule and my flying with you, whether or not that was not during the early morning when we flew down there?

A. I don't remember exactly on that, no. [149]

Q. You stated that you have a certificated airlines? A. C.A.B. certificated, yes.

Q. Did you have a regular schedule at that time, that is, April, 1952, when you took off for Nenana from Fairbanks?

A. Those flights were made on a charter basis which do not have a time schedule.

Q. During the first part of April, 1952, when you were on a schedule basis, what time did you leave?

The Court: This is no longer redirect examination. He asked the witness only whether he recalled what day a convention started.

Mr. Coughlan: Your Honor, he asked him in regard to the time element—what time, if he recalled; whether it was noon or whether it was after 10:00 o'clock in the morning, on cross-examination.

(Testimony of Robert D. Byers.)

The Court: And he couldn't remember the day, so the redirect examination is limited to his recollection of the day.

Mr. Coughlan: I understand that, Your Honor, but he asked him questions——

The Court: I have ruled. I don't want to hear any argument on it.

Mr. Coughlan: That is all.

Mr. Stevens: Thank you, Mr. Byers.

(Thereupon, the witness was excused and left the stand.)

Mr. Coughlan: Call George Sullivan or Cyril Randell, [150] whichever one might be there.

### CYRIL RANDELL

a witness called in behalf of the respondent, was duly sworn and testified as follows:

### Direct Examination

By Mr. Coughlan:

Q. Would you state your full name, please?

A. Cyril Randell.

Q. How long have you been in the Territory of Alaska, Mr. Randell?      A. Oh, about 18 years.

Q. Were you in the Territory of Alaska in April of 1952?      A. I was.

Q. What was your occupation at that time?

A. Office manager for the N. C. Company.

Q. As office manager for the N. C. Company, did you have occasion at any time to see Respondent's

(Testimony of Cyril Randell.)

Identification C?           A. Yes, I have seen this.

Q. Was that kept in the regular course of business?           A. Yes.

Q. And what is it?

A. Well, it is a transmittal list of checks coming to Fairbanks from the outlying branches.

Q. Does that record purport to show checks coming from a [151] particular branch?

A. Yes, it is.

Q. What branch?           A. From Nenana.

Q. And does it bear a date?

A. Yes, it does.

Q. Referring to the record, Respondent's Identification C, can you state whether or not the name Cornelius P. Coughlan appears thereon?

A. Yes, it does, Jack Coughlan.

Q. And what date appears thereon?

A. You mean the date this was made out?

Q. No, the date adjacent to the name Jack Coughlan?

A. April 4. There are 2 checks on here; April 4 on both of them.

Q. What does that indicate?

A. Well, it indicates the date on the check was April 4. It was transmitted to us on April 10 from Nenana.

Q. And does that indicate that a check was given or cashed with the N. C. Company at Nenana, Alaska, on that date, the 4th day of April, 1952?

A. Well, it wouldn't necessarily be that date that it was cashed. That is the date on the check, but it



(Testimony of Cyril Randell.)

wouldn't necessarily have been the date on which we accepted the check in Nenana.

Q. Do you recall any further particulars concerning that [152] check?

A. Quite a few.

Q. Do you recall, concerning that particular check or those checks noted thereon, whether or not a person listed there as Jack Coughlan was in Nenana, Alaska, on the 4th day of April, 1952?

A. Well, I know Jack Coughlan was down there around that time.

Mr. Coughlan: That is all.

**Cross-Examination**

By Mr. Stevens:

Q. Does that identification show the bank upon which the check was drawn?

A. No, it does not.

Q. Do you know of your own knowledge what bank the check was drawn on?      A. Yes, I do.

Q. What bank was it?

A. First National Bank of Fairbanks.

Q. Did you receive payment for the check?

A. I am referring specifically now to this \$100.00.

Q. Yes, sir. [153]      A. Yes, we did.

Q. Did it clear the bank in the normal course of business?      A. No, it did not.

Q. And what happened? When did you get the payment for the check?

A. It was quite some time afterwards. It was returned to us by the bank marked N.S.F.

(Testimony of Cyril Randell.)

Q. And you have listed here only the date of the check itself?      A. That is right.

Mr. Stevens: No further questions.

Redirect Examination

By Mr. Coughlan:

Q. Then, Mr. Randell, the check that was placed through the Northern Commercial store at Nenana, purportedly on the 4th, did not clear the bank here, is that correct?

A. It cleared the bank in time. It did not clear immediately.

Q. Now, you mean in the normal course——

A. That is right, it did not.

Mr. Coughlan: That is all.

Mr. Stevens: No further questions. Thank [154] you, Mr. Randell.

(Thereupon, the witness was excused and left the stand.)

Mr. Coughlan: George Sullivan.

(The witness, George Sullivan, was not present.)

Mr. Coughlan: I will take the stand at this time, Your Honor.

CORNELIUS P. COUGHLAN

a witness called in behalf of the respondent, being the respondent, and having previously been duly sworn, testified as follows:

Mr. Coughlan: Your Honor, may I remove myself from the stand and allow Mr. Sullivan to testify, who was not here a moment ago?

The Court: Yes.

GEORGE MURRAY SULLIVAN

a witness called in behalf of the respondent, was duly sworn and testified as follows:

Direct Examination

By Mr. Coughlan:

Q. Would you state your full name, please?

A. George Murray Sullivan.

Q. How long have you resided in the Territory of Alaska, Mr. Sullivan? [155]

A. 33 years the end of the month.

Q. Where were you residing during the month of April, 1952? A. Nenana, Alaska.

Q. What was your occupation at that time?

A. Deputy United States Marshal.

Q. Recalling the first part of April, 1952, were you associated with the Junior Chamber of Commerce? A. I was.

Q. Would you state whether the Junior Chamber of Commerce was interested in any particular affair or event at Nenana, Alaska, at that time?

A. They were.

(Testimony of George Murray Sullivan.)

Q. Were you involved with that affair that they had at Nenana at that time? A. Yes, I was.

Q. What was your connection with the Jaycee's matter there?

A. I was president for Alaska of the Junior Chamber of Commerce at that time. We held our convention there.

Q. Do you recall the dates of that convention?

A. No, I don't.

Q. Do you recall whether or not I was in Nenana, Alaska, at the time of that convention?

A. Yes, you were. [156]

Q. Do you recall whether or not I was in Nenana, Alaska, at that convention the day prior to the main body coming to the convention?

A. I don't recall. I know you were there, but I don't recall now whether you were there the day before or not.

Q. Do you have any recollection whatsoever of the date of that convention?

The Court: He has already said he didn't.

Mr. Coughlan: I beg your pardon.

The Court: He has already said he didn't.

Q. Refreshing your recollection, was it on the 3rd, 4th and 5th of April, 1952?

A. I couldn't definitely remember that long. I don't remember.

Q. Is there any method by which you could ascertain that fact within a reasonably short time?

A. Yes, I could go to the Marshal's office and find out when I was given the voucher to go down

(Testimony of George Murray Sullivan.)

to the Healy River coal strike. That was the second day of the convention.

Q. Would that take a very few moments to do?

A. I don't know what their files are like. It shouldn't——

Mr. Stevens: Your Honor, I believe that the record before the court shows on page 539 that this witness was on the stand at the criminal proceeding and stated that as he recalled it at that time the date was the 5th and 6th of April, and [157] at that time he said that it was a Friday, Saturday and Sunday, the first week end in April, 1952. It is already a matter of record in this proceeding.

Q. You would be able to ascertain that date within a short time; that particular date?

A. Well, if their records are available I would be able to.

Mr. Coughlan: That is all. I would like to be able to recall this witness.

The Court: Why didn't you arrange for him to verify the dates before you called him?

Mr. Coughlan: Your Honor, because of the time consumed in the previous trial and commencing this action immediately afterwards I was not able to do so. Mr. Sullivan has been out of the Fairbanks area recently and I might, if the court pleases, ask him concerning that. I believe he just arrived back into town this morning.

The Court: But this case has been pending a long time. The court can't permit counsel to prepare their cases in the courtroom. You have got to

(Testimony of George Murray Sullivan.)

do that beforehand. Of course, if something arises that couldn't have been foreseen, that is different, but here you are attempting to establish the fact that you were at Nenana on a certain date by this witness so you should have exhausted all means of ascertaining the time that this convention was held, either through this witness or some [158] other witness and not disrupting the proceedings to the extent of letting them leave the stand with the understanding of coming back on.

Mr. Coughlan: I beg your pardon, sir. I didn't hear the judge's last remark.

The Court: To the effect you should prepare your case outside the courtroom.

Mr. Coughlan: I understand that was the general statement.

Q. (By Mr. Coughlan): You state that a voucher was given to you by the United States Marshal's office on the 2nd day of the convention?

A. I don't recall whether a voucher was given to me or not, but there would be papers in there to substantiate when I made that trip to Healy for their coal strike which was on the Saturday during the convention.

Q. That was the Healy River Coal Mine?

A. Usibelli Coal Mine.

Mr. Coughlan: That is all.

GEORGE MURRAY SULLIVAN

testified as follows on

Cross-Examination

By Mr. Stevens:

Q. Do you have any independent recollection of this time, [159] the 4th of April, 1952?

A. Of the 4th day of April. You mean in regards to——

Q. In regards to the 4th day? Just do you remember the occurrences that took place on that day?

A. No, I don't.

Q. Do you recall what time you first saw Mr. Coughlan at the convention, the Jaycee's convention?

A. As I recall it was the banquet we had the first evening of the convention, which, I believe, was on a Friday.

Mr. Stevens: No further questions.

Redirect Examination

By Mr. Coughlan:

Q. Mr. Sullivan, with reference to the first time that you saw me in Nenana at the convention, did I not see you and a Mr. Anderson, and a Mr. Jowel Buffington, with whom I had arrived on the plane, at Flo's Lunch counter at lunch prior to the time of the banquet that you referred to, which was a fried chicken affair, where your wife had lost some silver in the garbage can?

A. I believe you did. I can't positively say. I

(Testimony of George Murray Sullivan.)

kind of recollect in my mind, when you mention that, now that we did talk in there. I remember Jowel coming down there early in the day. [160]

Q. And do you recall approximately what time Jowel got there?

A. I believe right during noon time.

Q. Do you recall whether or not I was there with Jowel?

A. I think you were, but I can't positively say that you were. I believe that you were.

Mr. Coughlan: That is all.

Mr. Stevens: No further questions.

(Thereupon, the witness was excused and left the stand.)

Mr. Coughlan: Ask Mr. Coughlan to take the stand, Your Honor.

The Clerk: Respondent's Identification Nos. D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S and T.

### CORNELIUS P. COUGHLAN

a witness called in behalf of the respondent being the respondent, and having previously been duly sworn, testified as follows:

#### Direct Examination

By Mr. Coughlan:

Q. Mr. Coughlan, I request that you examine Respondent's Identification K, and state whether a signature appears thereon?

A. A signature appears thereon.



(Testimony of Cornelius P. Coughlan.)

Q. Do you recognize that signature?

A. I do. [161]

Q. Whose signature is it?

A. It is my own.

Q. And upon what date was that signature made?

A. It appears to have been made on the 2nd day of February, 1952.

Q. Mr. Coughlan, I ask you to examine Respondent's Identification L and state whether a signature appears thereon?

A. There appears to be a signature thereon.

Q. Whose signature is that, if you know?

A. It is my signature and was apparently made on the 31st day of March, 1952.

The Court: Is this for the purpose of offering into evidence specimens of Respondent's handwriting?

Mr. Coughlan: Yes, Your Honor, and I am going to compare it for a moment.

The Court: Were these made before there was any suspicion attached to you which furnished the basis for this?

Mr. Coughlan: Yes, I believe they were.

The Court: What is the Petitioner's viewpoint about that?

Mr. Stevens: Your Honor, I believe these documents and others were submitted to the Bureau of the Identification Division of the F.B.I., and the F.B.I. picked out certain of the exhibits we had given them and used them as known standards. All

(Testimony of Cornelius P. Coughlan.)

of these have gone into the F.B.I., and we have no objection [162] to them. They were made about the same time. They came out of the files here in the courtroom.

The Court: But it isn't apparent what the purpose now would be in offering these into evidence.

Mr. Coughlan: The purpose, Your Honor, is this: That Mr. Bowen, I believe to the interrogatories and cross-interrogatories appearing in Petitioner's Exhibit Z, has made reference to certain known and questioned signatures of C. P. Coughlan. Your Honor, at that time there was a multitude of signatures made on or about the time that the questioned documents were made that were obtained from the public records here in Fairbanks; ones that were made before any suspicion was brought concerning this case in any way whatsoever, but that Mr. Bowen saw fit to use others, entirely different samples of handwriting and——

The Court: I understand all that, but what is your purpose? What will be your purpose in offering these into evidence?

Mr. Coughlan: The purpose, Your Honor, is this: To state that these are my signatures. That the others are not my signatures, that Mr. Bowen used as known standards. That he rejected these, did not use them, did not make the comparison with these, even though they were sent to him as known standards. In other words, Your Honor, an expert witness cannot give competent evidence if he has not

(Testimony of Cornelius P. Coughlan.)

utilized the known standards that have been presented to him. [163]

The Court: Well, your position is that all he used were false signatures. Is that it?

Mr. Coughlan: My assertion is this: That it is apparent to anyone looking at these that they do not appear to be exactly or similar to the others that they have used or attempting to use as a standard at this time. He has rejected them. He has not mentioned them there and yet they were sent.

Mr. Stevens: I believe I would object to that statement, Your Honor. The Government sent to Mr. Bowen known handwriting standards. To start with those were standards from the very file involved—the file of the Estate of Raymond Silver; later, at Mr. Coughlan's request, we sent all of these items which he is now bringing in, in addition to the items we had previously sent Mr. Bowen. At the time we took the interrogatories of the F.B.I., as I have stated before, Mr. Bowen used the known handwriting samples that we had sent to him, the ones which were taken from the records of the Estate of Raymond Silver, and we brought in a couple of other examples, such as, check of Collins and Clasby and receipt of the bail money to show it was the same type of writing throughout a period from 1951 until 1954, the date of the comment on the back of the bail money receipt.

Mr. Coughlan: Your Honor, at the time the interrogatories were propounded the Respondent submitted cross-interrogatories specifically questioning

(Testimony of Cornelius P. Coughlan.)

the Government's handwriting specialist, Bowen, concerning these signatures. He failed to allow these [164] signatures to in any way affect his study. In other words, he just failed and completely refused to examine them even though they were accepted handwriting standards. He just didn't refer to them at all.

The Court: Who accepted them as handwriting standards?

Mr. Coughlan: I believe the United States Attorney and I went in and picked them out of the record together, didn't we?

Mr. Stevens: I went in with Mr. Coughlan and allowed him to pick them out of the record. These are not my selections, Your Honor.

The Court: Your purpose is to show there were others the handwriting expert could have considered in addition to the ones he did consider?

Mr. Coughlan: Not could have; should have.

The Court: Why?

Mr. Coughlan: Because these are taken from various and sundry cases in the public records, whereas, the so-called known standards that were submitted to him were taken from one place, namely, the very record that they were questioning the handwriting in and from dates that did not correspond to the dates of the checks that he was examining at the time. In other words, Your Honor, he is examining questioned writing. It would appear that he should not confine himself to examining the ques-

(Testimony of Cornelius P. Coughlan.)

tioned writing by writings contained within the same questioned file.

The Court: Your complaint is that he should have [165] considered these signatures?

Mr. Coughlan: Yes, that is one thing, Your Honor. I believe that I recognize my own signature and recognize the peculiarities of my own handwriting and am able to testify in that behalf.

The Court: You can introduce up to October 13, 1951, but other than that there is no burden resting on you to use all the signatures that anybody can possibly dig up. That is the ruling of the court. You can take what documents you have there that you testify are specimens of your handwriting, made without any efforts to alter or anything of that kind, and offer them into evidence and they will be admitted into evidence, but I am not going to listen to a long examination of yourself.

Mr. Coughlan: All right, Your Honor. I will offer the signatures on Respondent's Identification M, Respondent's Identification N, Respondent's Identification O, Respondent's Identification P.

The Court: Do they all antedate October 13, 1951?

Mr. Coughlan: No, I do not believe they do, Your Honor.

The Court: Then they are not within the ruling of the court.

Mr. Coughlan: Then I will object to the ruling of the court at this time concerning that aspect.

The Court: Proceed. [166]

(Testimony of Cornelius P. Coughlan.)

Q. (By Mr. Coughlan): Mr. Coughlan, I hand you Petitioner's Exhibit K and ask you to examine the same.

The Court: Does the Petitioner object to the Respondent testifying in narrative form?

Mr. Stevens: No, Your Honor. I believe that was the court's ruling yesterday.

The Court: I think to expedite the case you may testify in narrative form until there is some objection.

Mr. Coughlan: On page 2 of Petitioner's Exhibit K—or page 3, under paragraph 6, there appears certain words and figures as follows: (1) Probate Fees, \$30.00; (2) Jessen's Weekly "Notice to Creditors," \$10.00; (3) Fairbanks Insurance Agency, bond, \$55.00; (4) Frederick Donhauser——

The Court: That is an exhibit, as I understand it, so you need not recite the contents, but go ahead and say what you want to say.

Mr. Coughlan: ——which I recall to have been legitimate expenses of the Raymond Silver estate which Frederick Donhauser was administrator of.

The Court: Nobody is questioning that.

Mr. Coughlan: That each of the amounts thereafter represents a payment made in behalf of the estate. That Mr. Donhauser authorized each of the payments therein; that there were other and further payments made by check which should be in the probate file for the Silver estate, but which, apparently, [167] are not there at the present, which checks were, and another \$55.00 bond payment, or

(Testimony of Cornelius P. Coughlan.)

at least an extension payment of the bond of Frederick Donhauser which was for one year only and which was renewed. That there should appear 2 checks to Frederick Donhauser other than as shown on these particular voucher numbers.

The Court: Are any of these items questioned? Has anybody questioned them?

Mr. Coughlan: Your Honor, the purpose of this testimony at the present time is in respect to how many checks were issued out of this estate. Mr. Donhauser has testified that there were approximately 15 checks or 15 to 20 checks at that time. There has been no showing here, prior to this time, what has become of the checks that he stated that he signed. There hasn't been any testimony concerning that and it is my testimony and will be my testimony here that Mr. Donhauser did not in fact leave me any blank checks; that Mr. Donhauser did in fact sign checks in my office, but also at the same time placed in the person to whom it was to be paid, the amount of money to be paid and left only, to my recollection, the date of the check in blank.

The Court: Well, you can testify that he didn't leave you any checks signed in blank, but so far as these other items are concerned, the details relating to them I don't see how they could have any tendency to prove or disprove any issues of the [168] case.

Mr. Coughlan: Then I shall testify that Mr. Donhauser did not at any time leave me checks executed in blank; that he did leave me a number of

(Testimony of Cornelius P. Coughlan.)

checks to be paid to various persons for debts against the estate; that he wrote the names of the persons to whom the checks were to be paid on the check itself and if he left anything on the face of the check unwritten it was the date and I do not recall him writing checks at any particular time without the date being in it, but he may have done so. That in fact he left or made, in my office, a number of other checks against the account of the Silver estate do not show here.

The Court: Well, again you are going into the matters that I have just held are immaterial. There is no dispute about anything of that kind.

Mr. Coughlan: Your Honor, is it allowable to controvert the evidence presented by the Government on the defense?

The Court: What do you refer to now?

Mr. Coughlan: I am referring to the testimony of Mr. Donhauser that these were the checks that he could recall. The court would not allow me to question him this morning concerning any other checks.

The Court: Because he can't recall all the checks that were issued in the course of administering this estate does not make it a proper matter for this court in this case.

Mr. Coughlan: I understand that, Your Honor, but as far as the defense of this matter is concerned the administration [169] of the estate was administered with myself as attorney, is certainly relevant in this matter.

The Court: There is nothing in issue so far as



(Testimony of Cornelius P. Coughlan.)

the administration of that estate is concerned except what made the subject matter of these 4 counts. Nothing else, except as would tend to throw light on the charges of the 4 counts. We are not going to go into this final accounting, into all the contiguous items.

Mr. Coughlan: your Honor, this morning Mr. Donhauser testified that he left certain checks made in blank. I am merely trying to throw some light upon his testimony in respect to that one fact.

The Court: Well, you have already denied that he left any checks in blank.

Mr. Coughlan: Referring to Petitioner's Exhibit T and the purported signature of C. P. Coughlan, attorney in fact, that appears thereon, I wish to state that the "C" appearing in the word "Coughlan" does not resemble the method—

The Court: Do you deny the signature?

Mr. Coughlan: I have already denied it prior to this time.

The Court: You don't need to explain why you deny it if the District Attorney is satisfied with the explanation, but if the District Attorney wants to cross-examine you on what your denial is based on you may do so, but it is not part of your [170] case. You denied the signature and that is sufficient for all purposes so far as the defense is concerned.

Mr. Coughlan: Your Honor, the other day—

The Court: Well, I don't want to argue about it. I have ruled.

(Testimony of Cornelius P. Coughlan.)

Mr. Coughlan: And will that same ruling hold as to each and every signature appearing on the Government's exhibits?

The Court: Yes. I don't know how you can make a denial that can be any more absolute than the one that has been made here. If the District Attorney is dissatisfied with that denial, why, he can cross-examine you and if he cross-examines you then you can explain why it is not your signature.

Mr. Coughlan: Concerning Petitioner's Identification A, I wish to state or testify that the inventory in the Raymond Silver estate was filed shortly after the estate was established and Mr. Donhauser was made the administrator and that the inventory of said estate was filed at the time that an order to sell what is listed as a three-quarter ton G.M.C. pick-up truck was sold; that at that time the person who appears to have notarized the signature thereon "Joan R. Bullock" did not work for me; was not employed by me.

The Court: Whose signature now are you referring to?

Mr. Coughlan: I am referring to the one that appears to be——

The Court: But does it purport to be your signature? [171]

Mr. Coughlan: No, your Honor. I am merely referring to the fact that the person was not around my office at the time that this was supposed to have been signed, that is, the 15th day of May, 1951.

(Testimony of Cornelius P. Coughlan.)

The Court: At the time what was supposed to have been signed?

Mr. Coughlan: The signature that appears thereon.

The Court: On the inventory?

Mr. Coughlan: Yes, your Honor.

The Court: And that is for the purpose of bearing on what issue?

Mr. Coughlan: Bearing upon the issue of whether or not this estate file has been tampered with.

The Court: Well, what foundation is there for that issue?

Mr. Coughlan: Your Honor, Mrs. Nordale testified on the stand yesterday that an order for the court to order the sale of property an inventory must have been filed prior to that time. I have testified that in fact an inventory was filed shortly after the estate was placed in Mr. Donhauser's hands as administrator. That the inventory introduced here as part of that estate shows on its face not to have been received until a year later. That the person who has notarized it did not work for me or have anything to do with this estate whatsoever in 1951 as it is notarized there [172]

The Court: Why would the notary have to work for you in order to notarize any such document? You can go to any notary.

Mr. Coughlan: Your Honor, at the time that the inventory was made in this estate a person by the name of Ann St. John notarized the paper.

(Testimony of Cornelius P. Coughlan.)

The Court: I don't want to listen any discord of this kind. Now, as I understand it, you want to introduce this for the purpose of contradicting the Commissioner in her testimony in the respect that you have mentioned. Is that it?

Mr. Coughlan: That and to show by the record in this cause that the estate files in this case have obviously been tampered with, that they were not the proper source of known standards of handwriting of this Respondent; that the other documents that have been entered herein from that particular file, which this indicates has been tampered with, might also very well have been tampered with and in all probability have been tampered with. The signatures contained therein do not appear to be mine and do not resemble these other signatures and that the court has precluded the Respondent from any testimony concerning those facts and has further precluded the Respondent from cross-examining or examining any of the other witnesses concerning them.

The Court: I don't want to listen to this endless argument. What are you referring to? Now, there are 4 instruments that are made the basis of these counts against you and the [173] evidence must be confined to them, must bear on them. I am not interested in the fact that the United States Commissioner, according to your opinion, may not conduct her office in the way you think she should. We are not here to investigate that.

(Testimony of Cornelius P. Coughlan.)

Mr. Coughlan: Your Honor, it was not my contention that the United States Commissioner——

The Court: Your purpose for contradicting her in one instance——

Mr. Coughlan: Your Honor, I am limited then to the Government bringing in a portion of a record and then I am not able to give evidence on the whole record or the condition of the record.

The Court: It has to tend to establish your defense and so long as the evidence is confined to that, why, it will be allowed, but, otherwise, this lawsuit has got to end sometime. I am not going to permit it to be interminable.

Mr. Coughlin: I will allow it to end right now, your Honor. I will rest.

The Court: Do you have any rebuttal?

Mr. Stevens: Your Honor, we subpoenaed the records from the First National Bank to ascertain whether or not there were in fact three bank accounts there to clarify that matter, and I have not yet received them. If we might have 5 minutes I will call.

The Court: Recess for 10 minutes. [174]

(Whereupon, at 3:00 o'clock p.m., following a 10-minute recess, court reconvenes, and the following proceedings were had:)

Mr. Stevens: Call Mr. Hufford back, please.

## ERNEST M. HUFFORD

a witness called in behalf of the petitioner on rebuttal, and having previously been duly sworn, testified as follows:

Mr. Stevens: Your Honor, Petitioner's Exhibit Y is a copy of the portion of the full record of the bank account of Cornelius P. Coughlan of the First National Bank. We would like to ask Mr. Coughlan to stipulate we can withdraw the copy and put in the full record since he raised the question.

The Court: Very well.

Mr. Coughlan: Respondent stipulates that it is the full account of Cornelius P. Coughlan at the First National Bank, Fairbanks, Alaska, and may be substituted for the partial account that was formerly Petitioner's Exhibit Y, and that former Petitioner's Exhibit Y may be removed from the evidence in this case.

## Direct Examination

By Mr. Stevens:

Q. This is Petitioner's Identification 27, Mr. Hufford. Would you tell us what that is, please?

A. The ledger sheet of the starting of the account, of the [175] office account of C. P. Coughlan.

Q. And is that a record of your bank?

A. It is a record of our bank.

Q. And it is a record kept in the normal course of business, the office account of Cornelius P. Coughlan?

A. That is right.

Mr. Coughlan: Your Honor, I am going to ob-

(Testimony of Ernest M. Hufford.)

ject to any testimony concerning this since the court would not allow the Respondent to bring in any evidence concerning any other account or any other checks or any other matters pertaining to the Silver estate file.

The Court: All the accounts of the Respondent are material matters. Objection overruled.

Q. (By Mr. Stevens): Did you examine the accounts of your bank to determine whether or not there were other accounts in Mr. Coughlan's name at that time?

A. We only found two. One of his personal and this office account.

Mr. Stevens: We offer identification 27, your Honor.

Mr. Coughlan: I will object to it, your Honor. There is nothing—none of the checks and so on were mentioned therein during the course of this hearing which were supposed to have gone through that particular bank account.

Mr. Stevens: This is rebuttal, your Honor. Mr. Coughlan [176] stated there were more than 2 accounts at that time and we have shown how many there were.

Mr. Coughlan: And the court would not allow the Respondent to give any testimony concerning the accounts.

The Court: There wasn't anything said while you were on the stand as to the number of accounts you had. The number of accounts you have to which credits could have been made as a result of this

(Testimony of Ernest M. Hufford.)

transaction is, of course, a very material thing, so the objection is overruled.

The Clerk: Petitioner's Exhibit CC.

(Account of C. P. Coughlan at First National Bank was marked Petitioner's Exhibit CC.)

Mr. Stevens: Your witness, Mr. Coughlan

Mr. Coughlan: No questions.

(Thereupon, the witness was excused and left the stand.)

Mr. Stevens: Petitioner rests, your Honor.

The Court: Now, there is just one question I wish to ask and that is whether these checks, which are made the subject of the 4 counts of the information, whether any of the exhibits shows that the amount of these checks or some part thereof was credited to the account of the Respondent. Do any of the exhibits show that or does the transcript show it?

Mr. Stevens: It is our contention, as to the First check. your Honor, that we have shown that the check came into [177] Mr. Coughlan's possession and was cashed and that the administrator never saw it.

The Court: I am just making this observation in the way of inquiry to see whether something might have been overlooked.

Mr. Stevens: No, your Honor, we believe the record shows that, as to the one check in the amount of \$1,000.00, it went to the Bank of Fairbanks; \$400.00 was credited to Mr. Coughlan's personal



account and \$600.00 to his loan account. Of the other 2 checks for \$1,000.00 both went through the First National Bank and was credited to his own personal account and Mr. Coughlan drew from those checks as his personal account shows, so we believe the money did go to his personal account.

The Court: Isn't there still another check?

Mr. Stevens: There is a lot of talk in the record about \$4,000.00, but we only have three \$1,000.00 checks and a \$950.00 check involved in this transaction.

The Court: But you have only accounted for 3 checks in your explanation.

Mr. Stevens: No, your Honor, we have accounted for 2 checks in the Bank of Fairbanks which is in the form of photostats from microfilm and one check, which is Government's Exhibit X, the 5 checks, in the amount of \$1,000.00 went through the Bank of Fairbanks.

The Court: I was inquiring with particular reference to the account itself, the ledger [178] account.

Mr. Stevens: The ledger account of Mr. Coughlan at the Bank of Fairbanks shows the entry of \$400.00, the balance from the first \$1,000.00 check after part of the money had been applied to his note account. The ledger account from the First National Bank of Fairbanks has the deposit of two \$1,000.00 checks and we believe that that demonstrates——

The Court: What about this \$950.00 check

Mr. Stevens: That is the Government's Exhibit F, your Honor, which was testified to.

Mr. Stevens: The only reflection in the ledger

The Court: The ledger account——  
account is on the same day this was cashed, October 3, the Bank of Fairbanks shows an entry of \$500.00 to Mr. Coughlan's personal account. We cannot connect it directly through to that \$500.00.

The Court: Well, are the counsel ready now to argue the case?

Mr. Stevens: The Government is ready, Your Honor.

The Court: Unless there is surrebuttal—is there any surrebuttal?

Mr. Coughlan: There is none, your Honor.

The Court: You may proceed with the argument then.

(Whereupon, following the arguments of counsel for the Petitioner and counsel for the Respondent, the following proceedings were had:)

The Court: I will go over this transcript and announce [179] my decision tomorrow morning at 11:00 o'clock. You may adjourn court.

(Thereupon, at 4:05 o'clock p.m., this case was adjourned to the next morning, to be resumed at 11:00 o'clock a.m., March 23, [180] 1955.)

March 23, 1955—11:00 A.M.

The Court: In the matter of disbarment of Cornelius P. Coughlan, I conclude that the objections raised by way of answer are devoid of merit. The distinctions between the forms of action, in

equity and in law have been expressly abolished for a long time. There is but one form of complaint and the pleadings, including their amendments, in all civil cases are governed by the Federal Rules of Civil Procedure. However, so far as the trial itself is concerned the law provides that it shall be according to equity rules or as nearly in conformity therewith as possible. This provision governs because it is not in conflict with any rules of civil procedure. It becomes pertinent to inquire as to what these equity rules are. They are merely the maxim and principles of equity, many of which are embodied in the Rules of Civil Procedure. In fact, the rules are, in the main, an adoption of the equity rules.

Aside from this, however, the question as to whether one or the other applies to a specific issue or fact in this case is not presented, and hence will not be discussed. Of course, in the reception and evaluations of evidence and maxim conclusions, equitable principles must be applied, but even here the distinction between equity and the common law has been considerably narrow, for courts are enjoined by the Rules of Civil Procedure to admit, rather than exclude, evidence, the admissibility of which is doubtful. In other words, where it is [182] a close question whether proffered evidence is admissible under the rules of common law it should be admitted.

I find that the evidence in this proceeding, aside from the transcript which was offered as an exhibit, conclusively proves that the Respondent over a

period of 6 months embezzled \$3,950.00 from the Silver Estate. I further find that the testimony of the Respondent, with reference to his signatures on the several exhibits, is false and for that reason his demeanor in court and his testimony in other respects is entitled to no credence.

I should like to hear now from the United States Attorney as to the penalty. But, first, I would like to know whether restitution has been made?

Mr. Stevens: Restitution was made to the Silver Estate through the bonding company which carried the bond on Mr. Donhauser, but not through Mr. Coughlan. The bonding company has a judgment against Mr. Donhauser and Mr. Donhauser has an action pending against Mr. Coughlan which has not been completed as yet. No restitution has been made by Mr. Coughlan.

The Court: What recommendation have you to make as to the penalty to be imposed in this case?

Mr. Stevens: It is the Government's request that Mr. Coughlan be forthwith disbarred from practicing in the Territory of Alaska.

The Court: Has the Respondent anything to say, either [183] by way of extenuation or mitigation or in any other respect that is pertinent to this particular proceeding?

Mr. Coughlan: The Respondent has nothing to say at this particular time, your Honor.

The Court: Well, I conclude from the evidence that the Respondent is an unfit person to practice law and dishonest and that he should be disbarred for the protection of the courts and the public. The

findings of fact, conclusions of law and decree in conformity herewith may be presented to the court. There should be an order embodied that the Respondent shall not make any application for reinstatement until he first shows he has made full restitution, with interest, with the parties entitled thereto and that this has been done within 6 months within entry of the judgment. If there is nothing further to come before the court——

Mr. Coughlan: Your Honor, might I at this time bring up one pertinent fact here, that is, in respect to the findings of fact and conclusions of law. They will be filed with this court after the court has left—I mean, with this judge of the court after the court has left Fairbanks?

The Court: Well, if they can't be presented to me before I leave, why, they will be presented to me at Anchorage.

Mr. Coughlan: Yes, and the judgment will be signed at that time?

The Court: Yes. [184]

Mr. Coughlan: Now, your Honor, due to the fact that the judge in this particular case will be in Anchorage, rather than in Fairbanks, and it is a great distance from the City of Fairbanks, will this court allow the judge regularly sitting here to fix a supersedeas bond in this matter?

The Court: I think the matter of supersedeas bond should be presented to me. As a matter of fact, I am in doubt whether there is such a thing as superseding in an order of disbarment, but that is something that need not be decided at this time. In

the meantime, in view of the evidence in this case, I think that the court should make an order and the court does hereby order that the defendant be suspended from practice pending the entry of the decree in this case.

You may recess court subject to the call of the gavel.

(Whereupon, at 11:06 o'clock a.m., court was recessed subject to the call of the gavel.) [185]

United States of America,  
Territory of Alaska—ss.

I, Iris L. Stafford, Official Court Reporter, hereby certify:

That the foregoing is a true, full and correct transcript of the proceedings on the trial of the above-Entitled cause, not including the closing arguments of counsel, taken by me in stenograph in open court at Fairbanks, Alaska, on March 22 and 23, 1955, and thereafter transcribed by me.

/s/ IRIS L. STAFFORD.

[Endorsed]: Filed July 13, 1955, D. C. Terr. of Alaska.

[Endorsed]: Filed July 15, 1955, U.S.C.A. [186]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the list below comprises all of the proceedings and papers filed in this cause that are listed on the Designation of Record on Appeal of the Respondent and Appellant and the Designation of Record of the Petitioner and Appellee, viz:

- 1—Information.
- 2—Order re the Answer of the Respondent.
- 3—Amended information filed June 25, 1953.
- 4—Motion to Quash and Dismiss.
- 5—Minute Order Setting Trial.
- 6—Minute Order granting Motion to Quash.
- 7—Appellate Court Decision in No. 1651-Criminal.
- 8—Amended Information filed December 17, 1954.
- 9—Amended Order in re the Respondent answering.
- 10—Subpoena Duces Tecum served on U. S. Attorney.
- 11—Notice of Hearing on the taking of Deposition.
- 12—Motion of U. S. Attorney to Quash subpoena.
- 13—Notice of Hearing on above Motion.
- 14—Motion of U. S. Attorney to quash Notice of Deposition.
- 15—Minute Order re Deposition and Setting Trial.

16—Motion of Respondent re signatures of Donhauser.

17—Motion and Affidavit of Respondent in re additional Time to answer.

18—Motion of Respondent against the Information

19—Answer of the Respondent.

20—Stipulation in re Deposition of Clarence E. Bohn.

21—Receipt for a copy of the Deposition of Bohn.

22—Order Resetting Trial.

23—Trial by Court.

24—Findings of Fact and Conclusions of Law.

25—Order in re the Disbarment of the Respondent.

26—Notice of Appeal.

27—Motion for the Court to fix Supersedeas Bond.

28—Notice of Hearing on above Motion re Bond.

29—Order setting Hearing on the fixing of Bond.

30—Statement of Points.

31—Designation of Contents of Record on Appeal of the Respondent and Appellant, numbered 1 to 31, incl.

32—Motion for Extension of Time to Plead.

33—Order and Order setting Trial filed Dec. 30, 1954.

34—Motion of U. S. Attorney for Release of Documents.

35.—Signed Order for Release of Documents.

36—Notice of Hearing in re Motion to Dismiss.



37—Minute Order in re Motion to Dismiss and Answer.

38—Minute Order of Court Disqualifying itself herein.

39—Minute Order setting Trial.

40—Motion of Respondent for resetting of Trial.

41—Stipulation of Counsel in re Hearing.

42—Designation of Record of Petitioner and Appellee as indicated herein numbered 32 to 42, incl.

43—Affidavit of Service of foregoing Designation.

Manilla envelope with Identifications of Respondent and Appellant.

Manilla Envelope with Exhibits of Petitioner and Appellee.

Witness my hand and the seal of the above-entitled Court this 11th day of April, 1955.

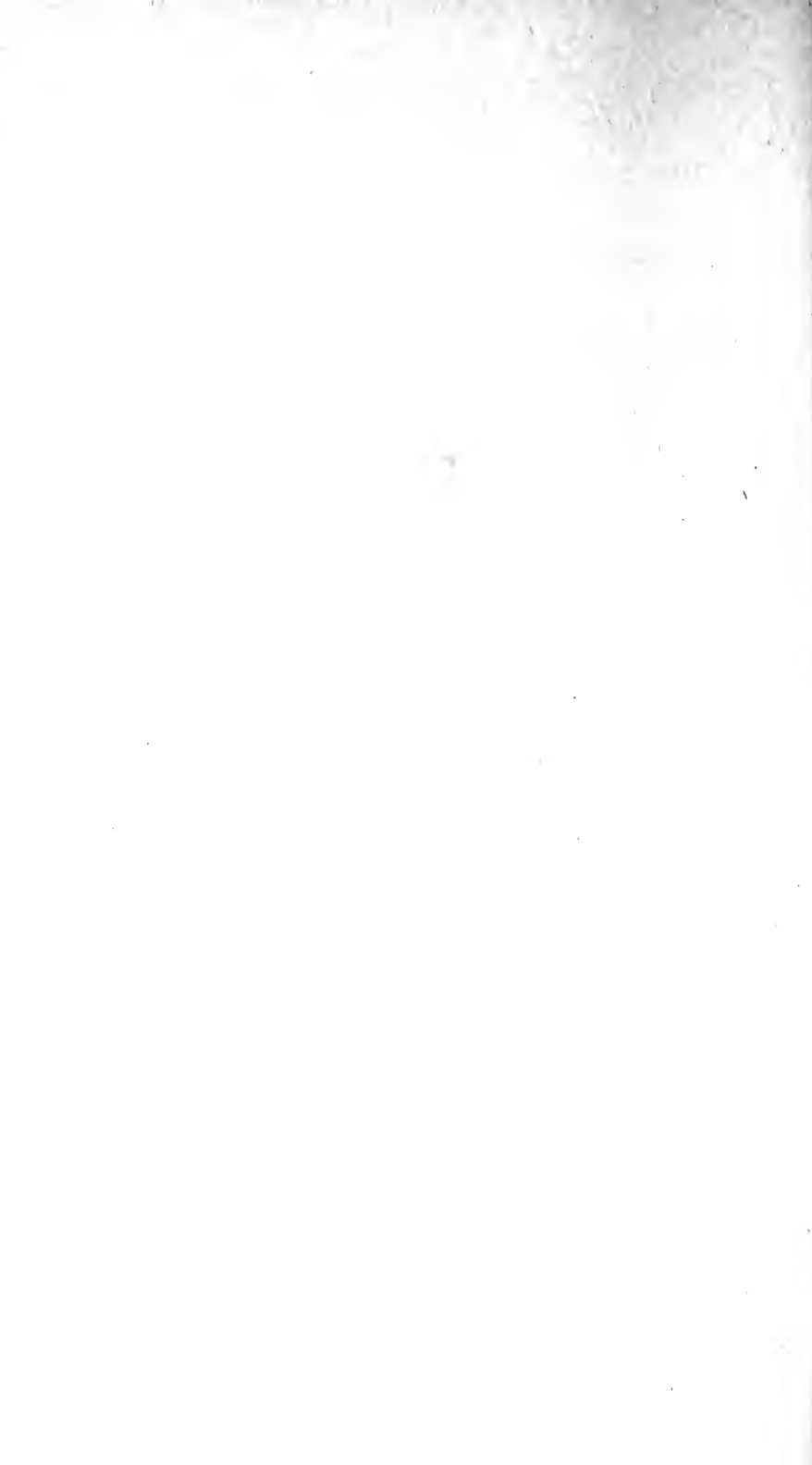
[Seal]      /s/ JOHN B. HALL,  
Clerk of Court.

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[Endorsed]: No. 14726. United States Court of Appeals for the Ninth Circuit. Cornelius P. Coughlan, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Fourth Division.

Filed April 14, 1955.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.



No. 14727

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United States  
Court of Appeals  
for the Ninth Circuit

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EVA ROSE BOLING,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record

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Appeal from the United States District Court for the Northern  
District of California, Southern Division

FILED

AUG 31 1955

PAUL P. O'BRIEN, CLERK



No. 14727

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United States  
Court of Appeals  
for the Ninth Circuit

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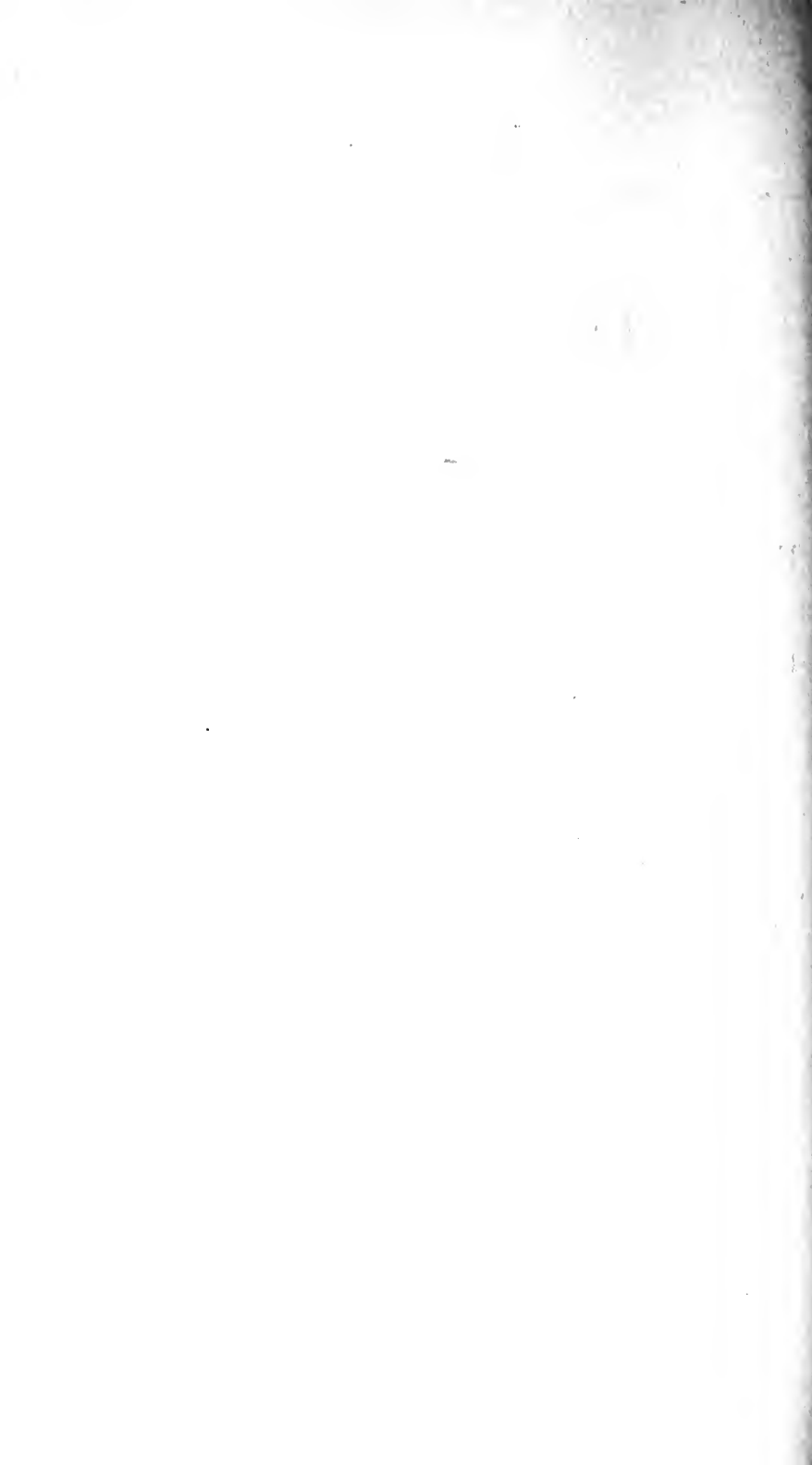
EVA ROSE BOLING, Appellant,  
vs.  
UNITED STATES OF AMERICA,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court for the Northern  
District of California, Southern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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Oakland, California,

RALPH L. BAKER,  
715 Easton Building,  
Oakland, California,

Attorneys for Plaintiff and Appellant.

LLOYD H. BURKE,  
United States Attorney,

FREDERICK J. WOELFLEN,  
Assistant United States Attorney,  
Post Office Building,  
San Francisco, California,

Attorneys for Defendant and Appellee.



In the District Court of the United States, Northern District of California, Southern Division

No. 30,764

EVA ROSE BOLING, Plaintiff,

vs.

UNITED STATES OF AMERICA,  
Defendant.

### DOCKET ENTRIES

1951

July 31—Filed complaint—issued summons.

Aug. 3—Filed summons, executed Aug. 2, 1951.

Sept. 14—Filed First Amended Complaint for Damages.

Sept. 25—Issued subpoena d. t. behalf plttf. for depn.

Nov. 19—Filed answer of defendant.

Nov. 30—Filed notice by plttf. of motion to set for trial, Dec. 10, 1951, with cert. of readiness.

Dec. 10—Ord. for trial Feb. 28, 1952 (Carter).

1952

Feb. 21—Ord. con'td. to April 30, 1952, for trial (Carter).

Apr. 25—Ord. cont'd. to May 26, 1952, for trial (Goodman).

May 26—Ord. cont'd. to May 28, 1952, for trial (Goodman).

May 28—Ord. cont'd. to May 29, 1952, for trial (Goodman).

1952

May 29—Ord. cont'd. to June 23, 1952, to be re-set (Goodman).

Jun. 23—Ord. motion to set off cal. (Goodman).

Aug. 11—Filed notice by plttf. of motion to set for trial Aug. 25, 1952, with cert. of readiness.

Aug. 25—Ord. for trial Sept. 24, 1952 (Roche).

Sept. 24—Ord. cont'd. to Jan. 7, 1953, for trial (Roche).

1953

Jan. 6—Ord. off trial cal. Jan. 7, 1953 (Harris).

May 27—Mailed notice dism. June 3, 1953.

Jun. 3—Ord. on motion deft. case dism. (Murphy)

1954

Jun. 1—Ord. after exparte hearing petitioner 1 week to employ counsel and move to vacate order dism. (Harris).

Jun. 4—Ord. on exparte motion of counsel for petitioner, granted 30 days to file formal motion to vacate dismissal (Harris).

Jun. 22—Filed substitution of Severson, McCallum & Davis as counsel for plaintiff.

Jun. 22—Filed substitution of Ralph L. Baker as counsel for plaintiff.

July 2—Filed notice and motion by plaintiff to vacate order of dismissal, July 12, 1954, at 9:30 a.m.

July 12—Ord. after hearing motion to vacate order of dismissal granted and case reinstated to calendar (Hamlin).

July 15—Filed ord. vacating order of dismissal and reinstating case to calendar (Hamlin).

1954

Aug. 3—Filed notice and motion by plaintiff to set for trial, Aug. 9, 1954, with cert. of readiness.

Aug. 6—Filed opposition of plaintiff to motion to vacate order of dismissal.

Aug. 9—Ord. motion to set con'td. to Aug. 16, 1954 (Murphy).

Aug. 19—Filed interrogs. by plaintiff to defendant.

Aug. 23—Filed interrogs by def't. to plaintiff.

Aug. 25—Filed association of J. Adrian Palmquist as atty. for plaintiff.

Oct. 28—Filed answer of defendant to interrogs. by plaintiff.

Nov. 12—Filed notice by plaintiff of taking deposition of Clark McCoy and issued Subp.

Dec. 10—Filed notice and motion by plaintiff to set for trial, Dec. 20, 1954, with cert. of readiness.

Dec. 20—Filed affidavit of Frederick J. Woelflen in opposition to motion to set for trial.

Dec. 20—Ord. motion to set for trial cont'd. to Jan. 24, 1955 (Goodman).

Dec. 22—Filed notice and motion by defendant to dismiss or vacate order reinstating case for trial, Dec. 27, 1954, with order shortening time for service (Goodman).

Dec. 22—Filed affidavit of Frederick J. Woelflen in support of motion.

Dec. 27—Ord. after hearing motion to dismiss for lack of prosecution subm. (Goodman).

1954

Dec. 29—Filed order granting motion of defendant to dismiss for lack of prosecution. Counsel to prepare and present order (Goodman).

Dec. 29—Mailed copies order to counsel.

Dec. 30—Filed order dismissing complaint with prejudice. (Microfilmed.) (Goodman).

Dec. 31—Mailed copies order to counsel.

1955

Jan. 5—Filed deposition of Clark McCoy.

Jan. 14—Filed amendment to order granting motion of defendant to dismiss for lack of prosecution (Goodman).

Jan. 17—Mailed copies order to counsel.

Feb. 17—Filed notice by plaintiff of motion to vacate order of dismissal and for reinstatement of cause to trial calendar, Feb. 23, 1955, before Judge Goodman.

Feb. 18—Filed memo. of deft. in opposition to motion to vacate order of dismissal.

Feb. 18—Filed answer of plaintiff to interrogs. by deft.

Feb. 23—Ord. after hearing motion to vacate order of dismissal denied (Goodman).

Feb. 25—Filed notice of appeal by plaintiff.

Feb. 28—Mailed notices.

Mar. 1—Filed order denying motion of plaintiff to vacate order of dismissal (Goodman).

Mar. 2—Mailed notices or order to counsel.

Mar. 7—Filed appeal bond in sum \$250.00.

1955

Mar. 25—Filed appellant's designation of record on appeal.

Mar. 28—Filed appellee's designation of record on appeal.

Apr. 6—Prepared and docketed record on appeal.

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[Title of District Court and Cause.]

### SUBSTITUTION OF ATTORNEYS

The Plaintiff, Eva Rose Boling, hereby substitutes Severson, McCallum and Davis as her attorneys in the above-entitled action in the place and stead of Hildebrand, Bills and McLeod.

Dated: This 23 day of April, 1954.

/s/ EVA ROSE BOLING

I hereby consent to the above substitution.

Dated: This 30 day of April, 1954.

/s/ HILDEBRAND, BILLS & McLEOD

We hereby accept the above substitution.

Dated: This 30th day of April, 1954.

SEVERSON, McCALLUM & DAVIS

/s/ By JAMES B. WERSON

[Endorsed]: Filed June 22, 1954.

[Title of District Court and Cause.]

### MINUTE ORDER

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Tuesday, the 1st day of June, in the year of our Lord one thousand nine hundred and fifty-four.

Present: The Honorable George B. Harris, District Judge.

This case came on this day *ex parte*. The plaintiff, Eva Rose Boling was present in Court without attorney. After hearing a statement by Mrs. Boling, the Court advised her to obtain the services of an attorney toward restoring this case, which had been dismissed on June 3, 1953, for want of prosecution, to the calendar. The Court allowed plaintiff one (1) week within which to accomplish this.

A True Copy, Attest:

[Seal]

C. W. CALBREATH,  
Clerk

/s/ By WM. C. ROBB,  
Deputy Clerk



[Title of District Court and Cause.]

MINUTE ORDER

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Friday, the 4th day of June, in the year of our Lord one thousand nine hundred and fifty-four.

Present: The Honorable George B. Harris, District Judge.

N. Tashjian, Esq., advised the Court that he and Ralph L. Baker, Esq., had been retained by the plaintiff to move the Court to restore this case to the calendar. Accordingly, Mr. Tashjian's request for thirty (30) days within which to prepare and present a formal motion to that end is Ordered Granted.

A True Copy, Attest:

[Seal]

C. W. CALBREATH,  
Clerk

/s/ By WM. C. ROBB,  
Deputy Clerk

[Title of District Court and Cause.]

### SUBSTITUTION OF ATTORNEYS

The Plaintiff, Eva Rose Boling hereby substitutes Ralph L. Baker as her Attorney in the above entitled action in the place and stead of Severson, McCallum and Davis.

Dated this 10 day of June, 1954.

/s/ EVA ROSE BOLING

I hereby consent to the above substitution.

Dated this 11th day of June, 1954.

SEVERSON, McCALLUM & DAVIS

/s/ By JAMES B. WERSON

I hereby accept above substitution of attorney.

Dated this 13th day of June, 1954.

/s/ RALPH L. BAKER

[Endorsed]: Filed June 22, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION TO VACATE ORDER  
OF DISMISSAL AND TO REVIVE ACTION

To the Defendant above named and to Lloyd Burke,  
United States Attorney:

You and each of you will please take notice that on Monday, the 12th day of July, 1954, at the hour of 9:30 o'clock a.m., or as soon thereafter as counsel can be heard, plaintiff will move the above entitled Court to vacate order of dismissal and to revive action in the above stated cause.

Dated: June 30, 1954.

RALPH L. BAKER,  
/s/ By NUBAR TASHJIAN,  
Attorney for Plaintiff

MOTION TO VACATE ORDER OF DIS-  
MISSAL AND TO REVIVE ACTION

The plaintiff moves the Court to vacate and set aside its order dated the 3rd day of June, 1953, in the above stated action and to revive the same on the grounds of plaintiff's mistake, inadvertence, excusable neglect and for other reasons as more fully appears in the affidavits of James B. Werson and Eva Rose Boling, hereto annexed as Exhibits "A" and "B" respectively.

Dated: The 30th day of June, 1954.

RALPH L. BAKER,  
/s/ By NUBAR TASHJIAN,  
Attorney for Plaintiff

## EXHIBIT "A"

AFFIDAVIT IN SUPPORT OF MOTION TO  
VACATE ORDER OF DISMISSAL AND  
TO REVIVE ACTION

County of San Francisco,  
State of California—ss.

James B. Werson, being duly sworn, deposes and says:

1. I am an attorney at law duly admitted to practice in the State of California, and I am a member of the Law Firm of Severson, McCallum & Davis of San Francisco, California.

2. On or about April 30, 1954 we agreed with Eva Rose Boling, Plaintiff herein that we would represent her in the above-entitled cause upon certain terms and conditions to which she agreed, that said terms and conditions were not performed on the part of Eva Rose Boling.

3. That on May 19, 1954 we learned for the first time, that on or about the 27th day of May, 1953 the Defendant above named moved to dismiss the above entitled cause; we are informed and believe that notice of said motion had been sent to Messrs. Hildebrand, Bills & McLeod, attorneys of record for Plaintiff above named, and that a dismissal of said action had been entered on or about the 3rd day of June, 1953 without opposition.

4. On May 20, 1954 we addressed a letter to Plaintiff advising her of the entry of the order of dismissal and the time within which to move to set aside said order of dismissal, and after point-

ing out that the terms and conditions previously agreed to had not been met, requested that she obtain other counsel.

/s/ JAMES B. WERSON

Subscribed and sworn to before me this 30th day of June, 1954.

[Seal]        /s/ AGNES WESTRA,  
Notary Public in and for the City and County of  
San Francisco, State of California.

EXHIBIT "B"

AFFIDAVIT IN SUPPORT OF MOTION TO  
VACATE ORDER OR DISMISSAL AND  
TO REVIVE ACTION

County of Alameda,  
State of California—ss.

Eva Rose Boling, being duly sworn, deposes and says:

1. That she is the plaintiff in the above stated action.
2. That until March, 1953, the firm of Hildebrand, Bills & McLeod were her attorneys in the above stated action, and during that month and year she attempted to substitute the law firm of Severson, McCallum & Davis in the above stated action but that it was not until April, 1954 that the substitution formally took place.
3. That the above entitled action had been set for trial in January, 1953, but upon request of the

government the parties to the above entitled action stipulated to a postponement of trial to an indefinite date.

4. That she did not receive a notice of the motion to dismiss the above entitled action for lack of prosecution nor did she have any knowledge of it.

5. That she did not learn of the order dismissing the above stated action for want of prosecution until May, 1954.

6. That she was effectively without counsel from March, 1953 until April, 1954, when the substitution of Severson, McCallum & Davis was effected.

7. That she is informed and upon that information states that the firm of Severson, McCallum & Davis, though in possession of the files in the above stated action, had no knowledge of the motion and order dismissing the above stated action for want of prosecution until May, 1954, or means of ascertaining it from the files in their possession.

8. That for good reason she discharged Severson, McCallum & Davis as her attorneys in the above stated action in May, 1954, and effected the substitution of Ralph L. Baker, Esq., as her attorney in the above matter in June, 1954.

9. That during the period from March, 1953, through May, 1954, she was engaged in a business that required protracted absences from the City of San Francisco so that she was unable to properly engage counsel in the above stated action.

/s/ EVA ROSE BOLING

Subscribed and sworn to before me this 24th day of June, 1954.

[Seal]            /s/ RALPH L. BAKER,  
Notary Public in and for the County of Alameda,  
State of California.

[Endorsed]: Filed July 2, 1954.

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[Title of District Court and Cause.]

## ORDER VACATING ORDER OF DISMISSAL

Plaintiff's motion in this cause to vacate and set aside order of dismissal for lack of prosecution having come on for hearing this 12th day of July, 1954, and after argument of counsel, it is this 12th day of July, 1954,

Ordered, that the order of this court dated June 3, 1953, dismissing without prejudice the above stated action for lack of prosecution, be and the same is hereby vacated and set aside, and the said action be and it is hereby revived. It is

Further Ordered, that this action be not placed on the trial calendar until further order of this court or upon request of either party.

/s/ O. D. HAMLIN,  
Judge, United States District Court

[Endorsed]: Filed July 15, 1954.

[Title of District Court and Cause.]

## OPPOSITION TO MOTION TO VACATE ORDER OF DISMISSAL

The defendant above named opposes the motion to vacate the order of dismissal of the above action on the following grounds:

1. That the said motion is made, although not so stated, under the provisions of Rule 60(b)(1) of Federal Rules of Civil Procedure. Said Rule 60(b) further provides that "the motion shall be made within a reasonable time and for reasons (1), (2), (3), not more than one year after the judgment order or proceeding was entered or taken". The action was ordered dismissed on the 3rd day of June, 1953; the motion to vacate was filed July 2, 1954 and was received by the office of the United States Attorney on July 6, 1954. Rule 6(b) provides that the court "may not extend the time for taking any action under Rules \* \* \* 60(b) except \* \* \* to the extent and under the conditions stated in them".

The motion having been filed over a year after the order dismissing the action, the Court has no jurisdiction to entertain the motion in that it was not timely filed.

2. That the motion and affidavits in support thereof fail to state facts sufficient to support the conclusion that there was mistake, inadvertence, surprise or excusable neglect. (See Exhibit "A" attached hereto).



Dated: July 12, 1954.

LLOYD H. BURKE,

United States Attorney

/s/ By CHARLES ELMER COLLETT,

Assistant United States Attorney

EXHIBIT "A"

AFFIDAVIT OF CHARLES ELMER COLLETT  
IN SUPPORT OF OPPOSITION TO MO-  
TION TO VACATE ORDER OF DIS-  
MISSAL

City and County of San Francisco,  
State of California—ss.

Charles Elmer Collett, being first duly sworn, de-  
poses and says:

That he is an Assistant United States Attorney;  
that the complaint in the above action was filed on  
July 31, 1951 and was assigned to Rudolph Scholz,  
then an Assistant United States Attorney; an  
amended complaint was filed September 14, 1951,  
and on November 19, 1951 an answer was filed.

That on December 10, 1951, on motion of the  
plaintiff, the case was set for trial on February 28,  
1952; on February 21, 1952, upon the motion of  
Mr. Scholz, trial date was continued to April 30,  
1952; prior to April 30th Mr. Scholz resigned as  
Assistant United States Attorney and on April 25,  
1952 a second motion to continue the trial date was  
made by affiant in order to permit reassignment of  
the case; trial date was continued to May 26, 1952.  
On May 26, 1952 there was no courtroom available  
and the case was continued to May 28, 1952; on

May 28, 1952 it was again continued by the Court to May 29, 1952; on May 29, 1952 affiant, together with the witnesses of the defense appeared in court, ready to go to trial; upon the representation of plaintiff's attorney the case was continued to June 23, 1952 to be reset. The representation was made to the Court that counsel had become aware of facts in the case which required further investigation and that until such investigation had been completed he was not prepared to go to trial.

On June 23, 1952 no one appeared on behalf of the plaintiff and the case was dropped from the calendar. On August 4, 1952 a new motion to set the case for trial was filed and on August 26, 1952 the case was set for trial on September 24, 1952. The case appeared on the calendar on September 24, 1952 for trial at 10:00 a.m.; affiant appeared in court at 10:00 a.m., with witnesses in behalf of the defense, prepared to go to trial, and discovered that at some time prior to 10:00 a.m., the attorney appearing in behalf of the plaintiff had requested a continuance, that the Court had granted such continuance to January 7, 1953. Affiant was informed that counsel in behalf of plaintiff had failed to inform the Court of the previous history of the case or that the office of the United States Attorney had not been notified that plaintiff would not be ready to go to trial. Affiant was also informed that the plaintiff was away on an extended vacation and that her counsel was unaware of her whereabouts.

On January 6, 1953 no one appeared in behalf of the plaintiff and the case was ordered off the

trial calendar.

On May 23, 1953 notice that the case was on the dismissal calendar for June 3, 1953 was mailed to plaintiff's counsel by the Clerk of the Court. On June 3, 1953 when the case was called no one appeared in behalf of the plaintiff and the case was dismissed by the Court on motion of the defendant.

The docket discloses that on April 30, 1954 a substitution of attorneys was filed substituting the law firm of Severson, McCallum & Davis, for Hildebrand, Bills and McLeod. Notice of this substitution was not received by the United States Attorney. In June of 1954 plaintiff substituted Ralph L. Baker, Esq., as her attorney in place of Severson, McCallum and Davis.

Affiant states that on May 29, 1952 and on September 24, 1952 affiant had called witnesses and was ready to proceed to trial; that said witnesses were then members of the armed forces of the United States; that said witnesses have since completed their respective tours of duty and their present whereabouts are unknown; that it will be with great difficulty that said witnesses can be located and made available for trial.

/s/ CHARLES ELMER COLLETT,

Subscribed and sworn to before me this 12th day of July, 1954.

[Seal]            /s/ MARGARET P. BLAIR,  
Clerk U. S. District Court, Northern District of  
California.

[Endorsed]: Filed August 6, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION TO SET CAUSE FOR TRIAL, AND IN SUPPORT OF ORAL MOTION FOR CONTINUANCE OF SETTING FOR 30 DAYS

United States of America,  
Northern District of California—ss.

Frederick J. Woelflen, being first duly sworn, deposes and says:

That he is an Assistant United States Attorney for the Northern District of California and is assigned to the defense of the above-captioned matter.

The plaintiff Eva Rose Boling having noticed before this Court her motion to set this cause for trial, affiant executes this affidavit in opposition to the setting of the cause for trial, on the grounds that the certificate of readiness accompanying said notice of motion represents to the Court that all pre-trial discovery procedures have been concluded and this matter is presently capable of proceeding to trial before this Court. Affiant alleges that not all pre-trial procedure, depositions and physical examinations have been completed, and that this matter is not in a position to be tried.

Affiant calls to the Court's attention certain facts concerning this litigation as set forth in an affidavit executed by Charles Elmer Collett, Assistant United States Attorney, on July 12, 1954, now on file in the record of these proceedings, said affidavit hav-

ing been filed in opposition to plaintiff's prior motion to vacate an order of dismissal of said action for lack of prosecution. Affiant represents to the Court that on June 3, 1953, plaintiff's complaint and cause of action was dismissed by this Court for lack of prosecution; that said action was originally instituted on July 1, 1951; that the docket on file with the Clerk of the United States District Court, Northern District of California, discloses that between July 31, 1951, and June 3, 1953, the trial date of said cause was continued on eight occasions; that on September 24, 1952, this matter was set for trial; that the defendant was ready, willing and able to proceed to trial on that date; that on that date plaintiff's counsel appeared in court prior to the hour set for trial, and in the absence of a representative of the United States Attorney obtained a continuance of said trial.

Affiant represents that upon said complaint being dismissed by the above-entitled Court on June 3, 1953, affiant advised the Department of Justice and the Department of the Air Force of said dismissal; and the Office of the United States Attorney for the Northern District of California, as well as the Department of the Air Force and the Department of Justice, Washington, D. C., closed their files on this litigation; that the effect of said dismissal was to release any holds that the Department of the Air Force might have on government witnesses; that thereafter government witnesses Charles A. Jones, the driver of the government vehicle, and Staff Sergeant Marvin R. Saxton and

Captain William H. Boulineau, who investigated the accident in question in this litigation and interviewed the plaintiff following the accident, were discharged from the military service or transferred to assignments outside the State of California; that this matter was ordered restored to the trial calendar by Judge O. D. Hamlin on July 12, 1954, after a motion had been made by plaintiff's counsel to vacate the order of dismissal of June 3, 1953. Plaintiff's written motion was not made until July 2, 1954—thirteen months after the Court's dismissal of June 3, 1953. Affiant alleges that since this matter was restored to the trial calendar on July 12, 1954, he has been continuously engaged in an attempt to obtain information regarding the present whereabouts of Charles A. Jones, the driver of the government vehicle, and likewise to ascertain the present duty stations of Staff Sergeant Marvin R. Saxton and Captain William H. Boulineau, the military personnel who investigated the accident for the Department of the Air Force. Affiant has only recently located the driver of the government vehicle, and affiant was advised by said witness on December 13, 1954, that it would not be convenient to him to have his deposition taken on oral interrogatories until after the end of the current calendar year, as said witness is presently attending school in an area of the State of Louisiana remote from the office of any United States Attorney; and said witness has requested affiant to delay the taking of his deposition until after January 1, 1955, when he will have returned to his home in Natchez,

Mississippi. To date affiant has been unable to obtain any information regarding the present whereabouts of said Staff Sergeant Saxton and said Captain Boulineau.

Affiant further states to the Court that on October 7, 1954, plaintiff submitted to a deposition on oral interrogatories conducted by affiant; that at the conclusion of said deposition affiant requested that plaintiff submit to a further physical examination (plaintiff originally having submitted to such an examination at the United States Air Force Hospital at Hamilton Air Force Base in January and February of 1952, and affiant having been informed that the doctors who conducted said physical examination of plaintiff are no longer in the service of the Department of the Air Force and not available to testify at the trial of this matter). Affiant verily believes that in view of the lapse of time between the date of the accident of October 11, 1950, and the last time plaintiff was examined by the defendant's doctors, on February 12, 1952, a further examination of plaintiff's physical condition is necessary in order to properly defend this trial. Since October 7, 1954, plaintiff has been continuously absent from the State of California and has been unable to submit to such a physical examination; and on October 7, 1954 (the occasion of the taking of her deposition, plaintiff had indicated her unwillingness to submit to any further physical examination. Plaintiff's counsel, Mr. Ralph Baker, has informed affiant that plaintiff would be willing to submit to a physical examination a few days

prior to the date on which this matter should be set for trial.

Affiant verily alleges that such physical examination of plaintiff would, by regulations of the Department of Justice, have to be conducted at the United States Public Health Service Hospital in San Francisco, California. Affiant respectfully represents that, inasmuch as the medical staff of the said hospital is required to give priority attention to large numbers of patients who are regularly entitled to the facilities of the hospital, under the laws of the United States, it would be extremely difficult for said doctors to conduct a physical examination of plaintiff two to three days prior to trial, complete the laboratory tests and x-ray films, consolidate the clinical findings from all procedures carried out in such an examination, and dictate the final report so as to have complete medical data in the possession of affiant in sufficient time for affiant to adequately prepare the medical phase of this litigation.

Affiant respectfully submits that this matter is not presently in a position to be set for trial; that further depositions will be required; that it will be necessary for the plaintiff to submit to a physical examination at least two weeks prior to the date of trial.

In view of the foregoing, It Is Respectfully Requested that the plaintiff's motion to set this cause of action for trial be continued for a period of not less than thirty days, in order to give the defendant United States of America sufficient opportu-



ity to take the depositions of its witnesses who are presently outside the State of California, and to allow adequate time for plaintiff Eva Rose Boling to submit to a further physical examination to be conducted by the defendant's doctors.

Dated: December 20, 1954.

/s/ FREDERICK J. WOELFLEN,  
Asst. United States Attorney

Subscribed and sworn to before me this 20th day of December, 1954.

[Seal] /s/ MARGARET P. BLAIR,  
Deputy Clerk, United States District Court for the  
Northern District of California.

[Endorsed]: Filed December 20, 1954.

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[Title of District Court and Cause.]

NOTICE OF MOTION FOR ORDER OF DIS-  
MISSAL OF CAUSE FOR LACK OF PROS-  
ECUTION, OR IN THE ALTERNATIVE,  
FOR ORDER VACATING ORDER RE-IN-  
STATING CAUSE FOR TRIAL

To the Plaintiff above named, and her attorneys:  
Ralph L. Baker, 715 Easton Bldg., Oakland 12,  
Calif.; J. Adrian Palmquist, 505 Central Bank  
Bldg., Oakland 12, Calif.; Nubar Tashjian,  
Phelan Bldg., San Francisco, Calif.:

You and each of you will please take notice that  
on Monday, December 27, 1954, at the hour of 9:30

a.m. or as soon thereafter as counsel may be heard, in the court room of Judge Louis E. Goodman, Room 258 Post Office Building, Seventh and Mission Streets, San Francisco, California, the defendant United States of America will move the above-entitled Court, in the alternative, for dismissal of the plaintiff's complaint and cause of action for lack of prosecution thereof, or for an order setting aside and vacating the order of July 12, 1954, rendered by Judge O. D. Hamlin of this Court, setting aside and vacating this Court's order of June 3, 1953, which dismissed said complaint for lack of prosecution.

Said motion will be made upon all the grounds, pleadings and affidavits on file herein,—most particularly, the affidavit of Charles Elmer Collett, Assistant United States Attorney for the Northern District of California, dated July 12, 1952, which affidavit was filed in opposition to plaintiff's motion to vacate the order of dismissal; as well as the affidavits of Eva Rose Boling and James Werson filed on July 2, 1954, in support of plaintiff's motion to vacate the order of dismissal; together with the affidavit of Frederick J. Woelflen appended to this motion, and the defendant's memorandum of points and authorities incorporated herein as follows:

#### MEMORANDUM OF POINTS AND AUTHORITIES

Rule 41(b), Federal Rules of Civil Procedure;  
Rule 60(b), *Ibidem*;

Rule 7(a) and 7(b), Amended, Rules of Practice, Northern District of California.

The instant action of plaintiff Eva Rose Boling was instituted under the Federal Tort Claims Act upon her filing of the complaint in the above-entitled Court on June 30, 1951. The complaint alleges that as a result of an accident which occurred on October 18, 1950, she sustained certain personal injuries for which she seeks recovery in the sum of \$75,300. An amended complaint was filed by the plaintiff on September 14, 1951, and thereafter on November 19, 1951, the defendant United States of America filed its answer to said complaint. The Court's attention is invited to the following docket entries on file with the Clerk of the United States District Court, concerning proceedings taken after the issues were joined:

November 30, 1951—Plaintiff moved to set cause for trial;

December 10, 1951—Trial set for February 28, 1952;

February 21, 1952—Trial continued to April 30, 1952;

April 25, 1952—Trial continued to May 26, 1952;

May 26, 1952—Trial continued to May 28, 1952;

May 28, 1952—Trial continued to May 29, 1952;

May 29, 1952—Matter continued to June 23, 1952, to be re-set;

June 23, 1952—Plaintiff's motion for setting of cause for trial placed off calendar by virtue of lack of appearance of plaintiff or her counsel;

August 4, 1952—Plaintiff's motion to set cause for trial filed;

August 26, 1952—Trial of cause set for September 24, 1952;

September 24, 1952—Trial ordered continued to January 27, 1953 (See affidavit of Charles Elmer Collett, at page 1, line 31, to page 2, line 11);

January 6, 1953—Trial placed off calendar;

May 23, 1953—Clerk's notice of motion to dismiss for lack of prosecution, pursuant to provisions of Rule 7(a) and (b), mailed to plaintiff's counsel;

June 3, 1953—Complaint dismissed for lack of prosecution;

July 2, 1954—Motion filed to vacate order of dismissal of June 3, 1953;

July 12, 1954—Order granted vacating dismissal of June 3, 1953.

The effect of the dismissal by the Court on June 3, 1953, amounted to an adjudication of the cause on its merits (Rule 41(b), Federal Rules of Civil Procedure).

The plaintiff's motion of July 2, 1954, to vacate the order of dismissal of June 3, 1953, was not made within the time limitation required by Rule 60(b) of the Federal Rules of Civil Procedure, said Rule 60(b) requiring that a motion to vacate a dismissal must be made within one year after entry of the order or judgment. Inasmuch as plaintiff's motion was made thirteen months after the entry of the order of June 3, 1953, the Court therefore lacked jurisdiction on July 12, 1954, to entertain the plain-

tiff's motion of July 2, 1954, and was without power to vacate or set aside the dismissal of June 3, 1953.

The affidavit of plaintiff Eva Rose Boling in support of her motion to vacate the dismissal of June 3, 1953, clearly shows that she was aware, not later than May of 1954, of the dismissal of her suit on June 3, 1953, and that she was fully cognizant of the posture of her litigation against the government within one year following its dismissal. On May 20, 1953, she was apprised by her counsel that immediate steps should be taken to vacate the dismissal of June 3, 1953 (See affidavit of James Werson filed on June 2, 1954). Despite this knowledge the plaintiff took no immediate steps to protect her rights, but slept on them until formally moving the Court on July 2, 1954, to set aside the previously entered dismissal. The plaintiff's subsequent actions to protect her interests do not obviate the fact that her motion of July 2, 1954, was not made within the time limitation provided by Rule 60(b), above mentioned.

Hicks vs. Bekins Moving and Storage Van Co.,  
115 F.2d 406 (9th Cir.);

United States vs. Pacific Fruit & Produce Co.,  
138 F.2d 369 (9th Cir.).

It is the contention of the defendant that despite any motion which might be made by the United States for dismissal, the record in this litigation is such that the Court in this litigation has inherent power on its own motion to dismiss the cause for want of prosecution.

Sweeney vs. Anderson, 129 F.2d 756 (10th Cir.);  
Shotkin vs. Westinghouse Electric & Mfg.  
Corp., 169 F.2d 825 (10th Cir.).

It is respectfully submitted, in view of the authorities cited herein and the affidavits on record in this cause, that plaintiff's complaint and cause of action should be dismissed for lack of prosecution; or in the alternative, that the order of this Court dated July 12, 1954, setting aside this Court's prior order of dismissal of plaintiff's complaint for lack of prosecution, made and entered on June 3, 1953, should be set aside and this matter dismissed.

Ackerman vs. United States, 14 F.R.Serv., Par.  
60b. 29, Case No. 4,340 U.S. 193.

Dated: December 22, 1954.

Respectfully submitted,

LLOYD H. BURKE,  
United States Attorney

/s/ By FREDERICK J. WOELFLEN,  
Asst. United States Attorney

### ORDER SHORTENING TIME

Upon the ex parte application of the defendant United States of America in good cause appearing, It Is Hereby Ordered that service of a copy of the above motion and memorandum of points and authorities in support thereof may be made not later than 5:00 p.m., December 23, 1954, and that service of the above order may be effected by mailing a

copy of said motion and memorandum to the respective counsel for the plaintiff herein.

Dated: December 22, 1954.

/s/ LOUIS E. GOODMAN,  
United States District Judge

[Endorsed]: Filed December 22, 1954.

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[Title of District Court and Cause.]

**AFFIDAVIT IN SUPPORT OF MOTION FOR  
ORDER OF DISMISSAL OF CAUSE FOR  
LACK OF PROSECUTION, OR IN THE  
ALTERNATIVE, FOR ORDER VACATING  
ORDER RE-INSTATING CAUSE FOR  
TRIAL**

United States of America,  
Northern District of California—ss.

Frederick J. Woelflen, being first duly sworn, deposes and says:

That he is an Assistant United States Attorney for the Northern District of California and is the attorney currently assigned to the defense of the above-captioned matter;

That prior to July 12, 1954, the defense of this suit had been handled primarily by Charles Elmer Collett, Assistant United States Attorney for the Northern District of California; that during the month of January 1953 affiant had assisted Mr.

Collett in the preparation of this matter for trial, which had been scheduled for January 7, 1953; that by virtue of affiant's heavy trial schedule during the month of January 1953, said cause was placed off calendar when originally set for trial on January 7, 1953; that thereafter affiant did not personally handle the instant litigation until August of 1954, following the granting of plaintiff's motion to vacate this Court's order of dismissal dated June 3, 1953;

That subsequent to July 12, 1954, affiant in reviewing the file in this litigation and in attempting to prepare this matter for trial, became aware for the first time of the fact that there were no longer available to him any government witnesses who could personally appear at the trial of this cause and assist him in adequately defending plaintiff's suit; and affiant alleges that the absence of such witnesses is occasioned by reason of the fact that after this matter had been dismissed on June 3, 1953, the instant litigation was placed in closed status in the United States Attorney's office in San Francisco, and the Department of Justice in Washington, D. C., and the Department of the Air Force in Washington, D. C., were advised that it was no longer necessary that a hold be placed upon the appropriate government witnesses in order to make them available if this matter should proceed to trial;

That one of the witnesses released as a result of said dismissal of this cause was Charles A. Jones, the driver of the Air Force vehicle involved in this



litigation, and the sole government eyewitness to the accident which gave rise to the instant suit; that at the time this matter was dismissed Mr. Jones was a member of the Air Force and was stationed at Hamilton Air Force Base, Marin County, California, and was readily available for testimony if this matter had proceeded to trial; that subsequent to the dismissal of June 3, 1953, Mr. Jones was discharged from service and returned to his home in Nachez, Mississippi, and since that time has been attending college in Louisiana; that on December 15, 1954, Mr. Jones communicated with affiant, stating that because of the long period of time which has elapsed since the accident of October 18, 1950, he cannot accurately recall any facts surrounding the accident and therefore feels that he can be of no material assistance to the United States in defending this matter in event it should proceed to trial.

Affiant alleges that if this matter does proceed to trial the defendant United States of America will be required to present the testimony of its sole eyewitness to the accident in question, Mr. Jones, by way of deposition, and that the said faultiness of his memory, resulting from the time lapse between October 18, 1950 and the taking of his deposition some time in January of 1955, will not materially aid the defense of this litigation.

Affiant alleges that on October 7, 1954, plaintiff Eva Rose Boling submitted to a deposition taken by affiant and at that time testified that she was

suffering from certain personal injuries resulting from the accident of October 18, 1950, additional to those which she had described to the government doctors who had examined her on January 30, 1952, and on February 12, 1952, at Hamilton Air Force Base Hospital;

That affiant has been informed by the Department of the Air Force that the doctors who examined Mrs. Boling on said occasions are no longer in the military service and therefore cannot be made available to testify if this matter proceeds to trial;

That the Defendant United States of America will be required to incur additional expense in examining Mrs. Boling and that such expense will in no way be occasioned by any lack of diligence on the part of the defendant in preparing this matter for trial, but will be solely occasioned by the lack of diligence on the part of the plaintiff in protecting her interest; that is, by her having allowed the complaint to be dismissed for lack of prosecution.

Affiant alleges that by reason of the lack of witnesses and the lapse of time between the date of the accident and the date of the execution of this affidavit, the interests of the United States of America have been materially jeopardized, so as to prevent a proper presentation of a defense against the claim of *Eva May Boling*.

By reason whereof it is respectfully submitted and urged that the complaint of plaintiff *Eva Rose*

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Boling should be dismissed for lack of prosecution and with prejudice.

Dated: December 22, 1954.

Respectfully submitted,

/s/ **FREDERICK J. WOELFLEN**,  
Asst. United States Attorney

Subscribed and sworn to before me this 22nd day  
of December, 1954.

[Seal] /s/ MARGARET P. BLAIR,  
Deputy Clerk, United States District Court for the  
Northern District of California.

[Endorsed]: Filed December 22, 1954.

In the United States District Court for the Northern District of California, Southern Division

No. 30764

EVA ROSE BOLING, Plaintiff,  
vs.  
UNITED STATES OF AMERICA, Defendant.

ORDER GRANTING MOTION TO DISMISS  
FOR FAILURE TO PROSECUTE (Rule  
41b FRCP.)

Plaintiff filed a suit under the Federal Tort Claims Act on July 31, 1951, alleging that she had been injured by a government vehicle in an accident claimed to have occurred on October 18, 1950. The answer of the United States of America

was filed on November 19, 1951. Motion to set for trial was filed on November 30, 1951. From that time trial was continued a number of times. On June 3, 1953, pursuant to Rule 7(a) and (b) of the Rules of this Court, the cause was dismissed for lack of prosecution.

On April 23, 1954, plaintiff substituted new attorneys; on June 10, 1954, plaintiff again changed attorneys; on July 2, 1954, the last appointed attorney filed a motion to vacate the order of dismissal of June 3, 1953, pursuant to Rule 60a and b of the FRCP. On July 12, 1954, even though more than a year had elapsed since the dismissal, (see 60b FRCP) the court vacated the order of dismissal of June 3, 1953.

Now before the court is defendant's motion, filed December 22, 1954 pursuant to Rule 41b FRCP, to dismiss the cause for failure of plaintiff to prosecute.

At all times since the cause was at issue the calendar of this court was such that the cause could have been set for trial and promptly tried.

The history of this litigation compels the conclusion that there has been a failure to prosecute the action and that an involuntary dismissal pursuant to Rule 41b FRCP should be adjudged. The policy of the law against the litigation of stale demands is based upon important and vital considerations, one of the most important of which is the great difficulty of doing justice as between litigants upon testimony as to long past events. This case should be governed by that policy.

Accordingly the motion to dismiss for failure to prosecute is granted. Present order accordingly.

Dated: December 29, 1954.

/s/ LOUIS E. GOODMAN,  
United States District Judge

[Endorsed]: Filed December 29, 1954.

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[Title of District Court and Cause.]

**ORDER DISMISSING COMPLAINT AND  
CAUSE OF ACTION WITH PREJUDICE**

The motion of the defendant United States of America for an order of dismissal of complaint for lack of prosecution, or in the alternative for an order vacating the order reinstating the cause for trial, came on regularly for hearing on December 27, 1954, the defendant appearing by Lloyd H. Burke, United States Attorney for the Northern District of California, and Frederick J. Woelflen, Assistant United States Attorney, and the plaintiff Eva Rose Boling appearing by and through her counsel Ralph L. Baker, Esq.; and the motions having been argued, and the Court having been apprised of the law and the facts and the premises, and having on December 27, 1954, taken the motions under submission; and thereafter, on December 29, 1954, the Court having filed its order granting the motion to dismiss for failure to prosecute, It Is Hereby Ordered, Adjudged and Decreed that the complaint and cause of action of plaintiff Eva Rose

Boling be and the same is hereby dismissed with prejudice.

Dated: December 30th, 1954.

/s/ LOUIS E. GOODMAN,  
United States District Judge

Certificate of Service attached.

[Endorsed]: Filed December 30, 1954.

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[Title of District Court and Cause.]

AMENDMENT TO ORDER GRANTING MOTION TO DISMISS FOR FAILURE TO PROSECUTE

In its order of December 29, 1954, granting defendant's motion to dismiss for failure to prosecute, the Court noted that plaintiff had on July 2, 1954 filed a motion to vacate the order of dismissal of June 3, 1953, and that on July 12, 1954, more than a year following the dismissal, the order of dismissal was vacated. Although the order did not so state, the Court was aware of the fact that on June 1, 1954, within the year following the dismissal of June 3, 1953, the plaintiff had appeared informally ex parte and had been granted one week to secure counsel and move to vacate the order of dismissal, and that on June 4, 1954, counsel for plaintiff appeared ex parte and was granted 30 days to file a formal motion to vacate the dismissal.

The order granting the motion to dismiss was not based upon the fact that the formal motion to

vacate the dismissal was not filed within a year after the dismissal, nor was the order based upon any single factor in this proceeding. Rather, the basis for the order was the conclusion that the entire record of this proceeding shows that there has been a failure to diligently prosecute the action and that the cause has become stale.

Dated: January 14, 1955.

/s/ LOUIS E. GOODMAN,  
United States District Judge

[Endorsed]: Filed January 14, 1955.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that Plaintiff hereby appeals to the United States Court of Appeals for the Ninth Circuit from those certain orders and decrees entered in the above entitled action on December 29, 1954 and December 30, 1954 and the amendment thereto filed January 14th, 1955.

February 25, 1955.

/s/ NUBAR TASHJIAN,  
Attorney for Plaintiff

[Endorsed]: Filed February 25, 1955.

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals, or true copies thereof, filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the parties:

Complaint.

First amended complaint for damages.

Answer.

Substitution of attorneys.

Substitution of attorneys.

Notice of motion to vacate order of dismissal and to revive action with affidavits attached.

Order vacating order of dismissal.

Opposition to motion to vacate order of dismissal with affidavit attached.

Plaintiff's interrogatories.

Defendant's interrogatories.

Answer to plaintiff's interrogatories.

Affidavit in opposition to plaintiff's motion to set cause for trial, and in support of oral motion for continuance of setting for 30 days.

Notice of motion for order of dismissal of cause for lack of prosecution, or in the alternative, for order vacating order re-instating cause for trial.

Affidavit in support of motion for order of dismissal, etc.



Order granting motion to dismiss for failure to prosecute.

Order dismissing complaint and cause of action with prejudice.

Amendment to order granting motion to dismiss for failure to prosecute.

Notice of motion to vacate order dismissing cause for lack of prosecution, and for order re-instating cause for trial.

Answers to interrogatories propounded by United States.

Notice of Appeal.

Order denying plaintiff's motion to vacate order of dismissal.

Designation of record on appeal.

Counterdesignation of record on appeal.

Docket entries.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 6th day of April, 1955.

[Seal]

C. W. CALBREATH,

Clerk

/s/ By WM. C. ROBB,

Deputy Clerk

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[Title of District Court and Cause.]

## SUPPLEMENTAL CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of Cali-

ifornia, do hereby certify that the foregoing document, listed below, is the original filed in the above-entitled case, and that it constitutes a part of the record on appeal herein:

Reporter's transcript of motion to vacate order of dismissal in one volume of Monday, July 12, 1954.

Reporter's transcript of motion to dismiss in one volume of Monday, December 27, 1954.

Cost Bond on Appeal.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 4th day of May, 1955.

[Seal]                      C. W. CALBREATH,  
                                    Clerk  
                            /s/ By WM. C. ROBB,  
                                    Deputy Clerk

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[Title of District Court and Cause.]

## TRANSCRIPT OF PROCEEDINGS

Tuesday, June 1, 1954

Before: Hon. George B. Harris, Judge.

Appearances: For the Plaintiff: In Personam;  
For the Defendant: None.

Mrs. Boling: I am Eva Rose Boling, plaintiff in case No. 30764 against the United States of America, and I have just received notice that it has been set for dismissal June 3rd through Judge Murphy's dismissal calendar. Notice of dismissal

was sent to Hildebrand, McLeod & Bills, the attorneys that I had before I changed to those other attorneys. Let's see. Their names are Sederson, McCallum & Davis and Mr. Werson has been handling the case since February 10th, 1953, when I hired them.

They wrote me a letter May 10th, 1954 telling me that all this different data; that on February 10th, 1953, at which time I wrote them inquiring if they would handle the case, and the next day Mr. Almon McCallum phoned me in San Bernardino and told me he would take the case; that he wanted it very badly, and he made a phone call instead of writing.

Then on the 16th of March I contacted them again, and on March 24th, 1953 again, and he said that—or he wrote to me, rather, and told me that he had written to Mr. Sheridan Downey who was handling the case at that time requesting him to forward my file to their office—McCallum's office—for the purpose of reviewing it to ascertain whether they would be willing to represent me. And then on March 31st they wrote me again telling me that they reviewed the case and asking me to send details explaining about the accident. And on April 23rd they wrote to me again and asked me to stop in on my way down.

You see, I sell a product I manufacture, Boling's Spot Remover. I sell that to the stores in different towns throughout the United States to introduce it. Then at that time I was up near Canada. So I wrote to him and told him that on the way down I

would stop in to see him, which was in December just before Christmas.

He didn't tell me at that time that—well, he did tell me, rather, that he would take the case the same as Hildebrand, McLeod, and them had agreed to take it, and that was on a 20 percent basis of the amount that I should receive and that I didn't have to pay them until I received that.

And then when I went in to see him in December he said he would take the case in the same manner, and he never mentioned a thing about \$150 costs or \$200 retainer fee, and he said he would take it and all like that.

So I had faith in believing that he was going to handle it.

The Court: May I interrupt a moment? Mr. Welch, this case was dismissed when?

Mr. Welch: Dismissed for lack of prosecution around June 3, 1953.

Mrs. Boling: Yes, June 3rd, and they sent a letter to Mr. Hildebrand, and he didn't send the letter when this Mr. McCallum asked for the papers; he didn't send that letter on when it came in, although he knew that Mr. McCallum had the case.

The Court: Presently, do you have an attorney representing you at all?

Mrs. Boling: No, he said later on—he said it to me in April——

The Court: You had better get a lawyer, madam.

Mrs. Boling: Yes. In April he sent the substitution papers to me—I mean in March he sent the substitution papers to me; that was in 1954——

The Court: Here is what you should do: Have a lawyer prepare a motion to restore the cause to the calendar.

Mrs. Boling: But I don't have time to do that, sir. And he wrote to me on May 27th——

The Court: You haven't time? What is the time element on this, Mr. Welch?

Mrs. Boling: To June 3rd.

Mr. Welch: The case has already been dismissed, Your Honor. She should have counsel present to represent her.

The Court: Can't you have someone to represent you? Haven't you a lawyer at all?

Mrs. Boling: Well, I had him until he said——

The Court: Well, he is out now. He has declared himself out. You must get someone else.

Mrs. Boling: Well, he said that I had to come in before June 1st down here, and he said we had no notice of this hearing at all from the government's attorney or from Mr. Downey. The dismissal was therefore entered without opposition on June 3rd, 1953, and then down here, and they didn't write to me and tell me either. On June 1st—he said the documents must be filed with the Court before June 1st. And then I didn't know a thing about that Mr. McCallum didn't want to take it until just before I came down here Friday. Last Friday I phoned to them and they told me that it was on account of this dismissal they didn't want to take it. And they didn't know a thing about it until they came in to file the papers. Now they hadn't even sent me papers for transfer of attor-

neys until—let's see; that wasn't until April—or, I mean when I was in Georgia. That was March. No, it was April. March 25th is when I phoned to them from Georgia, and they told me they had already sent me a letter, and they had addressed it Edith Boling, and they knew my name was Eva Rose Boling. But they sent me the substitution papers down to Georgia. Well, I didn't know anything about law and I didn't know that that was the first that they had even attempted to transfer a substitution of attorneys. I didn't know a thing about, and they told me when I phoned to them last Friday that they didn't know until they went to file substitution of attorneys that this case was up for dismissal. And so they said that's why they didn't want the case, because it was up for dismissal. And there I am left without anything. And they said it would have to be filed before the first in order to get the dismissal vacated. So I am just at a loss. And I am supporting my family; I have to go around selling through the country and I didn't know that that was the law; they they had to send papers for transfer of attorneys.

Mr. Welch: This is a tort action against the Government filed in 1951.

Mrs. Boling: And the reason I dismissed the first attorney was because he told me that——

The Court: You may have a week to get an attorney to represent you and bring the case in here and have your attorney move to set it back on the calendar, restore it to the calendar.

How many years elapsed? Five years?

Mr. Welch: One year has elapsed.

The Court: It was filed in '51, was it?

Mr. Welch: Yes, it was filed in '51.

The Court: Continue the matter one week until you get a lawyer.

Mrs. Boling: Thank you.

[Endorsed]: Filed May 11, 1955.

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[Title of District Court and Cause.]

HEARING ON MOTION TO VACATE ORDER  
OF DISMISSAL

Reporter's Transcript, Monday, July 12, 1954  
9:30 a.m.

Before: Hon. Oliver D. Hamlin, Judge.

Appearances: For the Plaintiff: Ralph L. Baker, Esq. For the Defendant: Lloyd H. Burke, Esq., United States Attorney, by C. Elmer Collett, Esq., Assistant United States Attorney.

Mr. Collett: If the Court please, before counsel begins I would like to file an objection to the motion to vacate the order and affidavit in support. I have served copy on counsel this morning.

The Court: State the background of the case.

Mr. Baker: If Your Honor please, in this matter an action was filed against the Government, and the original attorneys were the law offices of Hildebrand, Bills & McLeod.

The Court: They were the original attorneys for the plaintiff?

Mr. Baker: That is correct, Your Honor. And Mr. Sheridan Downey, Jr., represented the plaintiff

at that time; then subsequently the law office of Severson, McCallum and Davis were substituted in their stead.

The Court: As attorneys for the plaintiff?

Mr. Baker: That's right.

The Court: All right.

Mr. Baker: And they asked that a certain amount of money be set forth before they continued, and apparently the client wasn't contacted or wasn't able to fulfill that condition, and therefore I was substituted in their stead.

The Court: All right.

Mr. Baker: Now, this has been an unfortunate case. The Government has asked for three continuances on their own behalf, one for resignations and other reasons. Once there was no court room. The last continuance was requested by the Government on January 7, 1953.

Now, subsequent to that time they filed motion to dismiss, and apparently sent the notice to the law office of Hildebrand. Prior to that time——

The Court: What was the basis for the motion to dismiss?

Mr. Baker: We didn't receive a copy of that, and neither did Severson, McCallum & Davis. Hildebrand's office apparently had been dismissed but the substitution was not filed until some time in 1954 and no one appeared on behalf of our office——rather, the office of Hildebrand, Bills & McLeod, and no notice was given the law office of Severson, McCallum & Davis, nor to the plaintiff under Rule 60(b) subsection 1, giving right to obtain relief



from such an order, which in fact was not opposed by anyone and was made the same year when the last continuance was asked by the Government. Plaintiff received no notice whatsoever and the matters therein referred to were dismissed.

Under that same rule we are told the motion shall be made, that is, to obtain relief from the order of dismissal, that motion should be made within one year.

The dismissal took place on June 3rd, 1953. That was the date the matter was dismissed, the case was dismissed, and no one appeared on behalf of the plaintiff on that date.

Now, in the affidavit of Mr. Collett it is stated that no motion was made until after the one year period.

If Your Honor please, there are several bases for granting the relief in this case. First of all, under Rule 60, subdivision (b) (1); and second, under subdivision (6) is "any other reason justifying relief." And, of course the second basis would not require a one-year limitation for making the motion.

However, as a matter of fact, prior to the one-year after June 3rd, 1953, Mrs. Boling herself came to court, on June 1st, 1954, two days before her limitation was up, and asked the court to vacate the dismissal, and at that time she was given one week to obtain an attorney.

Under the case of *Elias vs. Pitucci*, 13 Fed Rules Decisions, page 13, in that particular case the court held the spirit of this one-year rule was complied with when motion was brought to the court's attention at a pre-trial conference. And it is our position

that the motion to vacate was in fact made within one year.

It seems in view of the fact that there is clear liability in the case, and the further fact that she has been made an offer for settlement, she ought to be given her day in court. It seems unquestionable in view of the further fact that the Government asked for a continuance on January 6th, 1953, at which time it was continued to an indefinite date and never set thereafter, and they came in and made a motion to dismiss and the matter was dismissed.

We feel under the circumstances the order for dismissal should be vacated, and we would like to get an early date and clear this matter up because it has been going on for some time.

I might briefly set forth a little history as to how the continuances were made and for what reasons:

On February 21st, 1952, upon motion of Mr. Scholtz the trial date was continued to April 30, 1952. Then Mr. Scholtz resigned, and on April 29, 1952, a second continuance was requested by Mr. Collett in order to permit reassignment of the case. At the trial date, May 26th, there was no court room available and the case was continued. The fact that the case had been continued many times were not completely on the part of the plaintiff. There were several times when it was apparently her fault. But the second time it was continued the representation was made on the part of the plaintiff that they had become aware of facts and required further facts, and the matter was again apparently continued.

June 23rd, 1952, no one appeared for the plaintiff and the case dropped. In August motion to set was filed on the 26th, and the case was set for trial in September. Then the court granted a continuance to January 7, 1953; and thereafter by a letter from the United States Attorney, December 30, 1952, to the law office of Hildebrand, Bills & McLeod:

“Above matter set for trial on January 7, 1953. This matter was originally assigned to Mr. Scholtz of this office. However, Mr. Scholtz is resigning effective January 1st and this case has been assigned to me for trial, and I ask the matter be continued,” and that was the last continuance granted at the request of the Government.

Subsequent thereto, after sending notice to the law office of Hildebrand, which we never received, which Severson never received and the plaintiff never received, the matter was dropped, and we feel the order should be vacated and the plaintiff given her day in court.

Mr. Collett: If the Court please, counsel has read several times from the affidavit that was filed by myself in opposition to this motion.

There were two occasions—this last statement with regard to January 6—just checking in the file for the letter he mentioned—it was my recollection no one appeared on January 6th, and the case was dropped off calendar. But the recitation in the affidavit, the trial date was first continued at the request of Mr. Scholtz.

The Court: I have glanced at that. But what I am interested in at the moment is the power of the Court to make an order in this matter. What about

counsel's statement that a motion was made within the year?

Mr. Collett: If I might call Your Honor's attention to the rule, under Rule 60, although his motion has not recited their authority, I gathered he was relying on 60(b):

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect."

That is one of the bases upon which the motion could be made. Then, "The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken."

Rule 6 says the court does not have the power to extend the time.

The Court: I am talking about, was there anything done within the year?

Mr. Collett: That is the rule. A couple of days before the year expired apparently a person representing herself as Mrs. Boling appeared in Judge Harris' court ex parte.

The Court: When was that?

Mr. Collett: That was shortly before June 3rd.

Mr. Baker: June 1st, 1954.

Mr. Collett: June 1st, counsel says. I accept his statement.

She appeared and requested—I couldn't exactly hear what she did say, and before I was aware of the motion she was making the Judge said, "You

will have to get an attorney," and something about time. He said, "I will give you a week within which to get an attorney."

Apparently she did get an attorney as I believe someone came in about the day before the expiration of that week.

Mr. Baker: That's right. Within the week motion was made for time to file an official motion.

The Court: Was that in writing?

Mr. Baker: No.

Mr. Collett: No; *ex parte*, and not in writing. The first motion in writing is the one now before the Court.

Mr. Baker: That is right.

Mr. Collett: It was a motion *ex parte* asking for extension of time.

The Court: Do both of you agree this motion was made after the informal matter of June 1st?

Mr. Collett: No, I would not agree to that.

Mr. Baker: No.

Mr. Collett: I don't think the Court entertained anything but said she should get an attorney to present whatever she had to present.

Mr. Baker: That is right. He stated she should have an attorney. But the motion was made. In fact, she asked the Court to vacate the order. Motion was set at a pre-trial conference—If we follow the letter of this rule, then certainly we would be out; but according to the spirit, the motion was made within the year.

But even if it were not made, under subdivision (6) it says any other reason justifying relief from

the operation of the judgment. Then we are told the motion shall be made within a reasonable time, etcetera. If it comes to Rule 6 there is no one-year limitation.

And she just learned of the order and came to court immediately. She had been notified by the law office of Severson, McCallum & Davis, and she appeared and made motion on her own behalf, and it seems only fair that she get her day in court, in view of the other continuances made by the Government.

I have before me a letter dated December 30, 1952, a few days before January 7th, signed by Mr. Frederick Woelflen, asking that the matter be continued, and that is why no one appeared. In view of the circumstances, it is only fair that this woman be allowed her day in court.

Mr. Collett: The only other thing I can say is that twice I've summoned witnesses for the trial of this case myself. The first time was after there wasn't a court room available. And as a result of an investigation made by the Government Mr. Woelflen requested a continuance. Then it was continued to June 30th, and no one appeared and it was dropped. Another motion to set was filed and it was set for September. And a strange thing occurred. The case was set for 10 o'clock. I appeared in Judge Roche's court ready for trial, and someone appeared for the plaintiff about a quarter of 10:00 and without—what representation was made I don't know, but the case was continued to January 6th.

I sat in court waiting for the Court to call it, and

it wasn't called, and then I found out someone appeared and the case had been continued. I learned later the reason for the continuance was that the plaintiff herself was sick and counsel didn't know where she was.

The Court: All right.

Mr. Collett: It came on the ultimate dismissal calendar in June and no one appeared.

The Court: Matter submitted?

Mr. Baker: May I make one other statement?

The Court: The matter is to be submitted. There seems to be some failure on the part of counsel on both sides to give notice to the other. However, that doesn't seem to be chargeable to the plaintiff, and in the interest of justice the motion to vacate and motion to dismiss may be granted.

[Endorsed]: Filed May 3, 1955.

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[Title of District Court and Cause.]

## MOTION TO DISMISS

### Reporter's Transcript

Monday, December 27, 1954 at 9:30 a.m.

Before: Hon. Louis E. Goodman, Judge.

Appearances: For the Plaintiff: Ralph L. Baker, Esq. For the Defendant: Lloyd H. Burke, Esq., United States Attorney, by Frederick J. Woelflen, Esq., Assistant U. S. Attorney.

The Clerk: Boling vs. United States, Motion to Dismiss.

Mr. Woelflen: May it please Your Honor, the

present motion is before the Court, which arose out of an accident, instituted under the Federal Tort Claims Act. The suit in question concerns an accident which happened on or about the 18th day of October 1950, near the entrance to the Hamilton Air Force Base, Marin County.

The plaintiff's complaint was filed on July 31, 1951. Thereafter an amended complaint was filed on November 14, 1951 and the United States answered on October 19, 1951.

I am reciting these facts from the docket to apprise Your Honor of some of the surrounding facts regarding this litigation.

On November 30, the matter was noticed to be set, and on December 10, 1951, the matter was set for trial on February 28, 1952.

On February 21, 1952, the matter was continued for trial until April 30. Thereafter, on April 20, the trial of April 30 was continued to May 26. On the 28th and 29th, the matter was continued by the Court. On the 29th the United States Government appeared in court ready to proceed to trial, at which time there was a request by plaintiff, plaintiff's counsel, that the matter go off calendar, they were not ready to proceed.

Thereafter on June 23 the matter—May 29th, 1952, the matter was continued until June 23 to be set. On June the 23rd the matter was set off calendar for lack of appearance of plaintiff's counsel to set the matter for trial.

On August 11, 1952, the matter was set for trial



and on August 26 the matter was set for trial on September 24, 1952.

If Your Honor will refer to the affidavit of Mr. Collett of our office you will notice that on the morning of the 24th of September, 1952, the Government again appeared in the court room of Judge Roche ready to proceed to trial. There was some representation made to the trial judge at that time and the matter was continued until January 1, 1953.

Between September 24, 1952 and January 1, 1953, I personally was assigned the file. Prior to that time it was handled by Mr. Scholtz and Mr. Collett. Due to the lack of staff in our office in January of 1953, which the Court will recall, I personally asked counsel that the matter be continued. They consented to a continuance, and the matter went off trial in January 1953.

Thereafter no motions were made by plaintiff or counsel to set this matter for trial at any time.

May 27, 1953 the matter came up on the Dismissal Calendar and on *January 3, 1953*, it was dismissed.

On July 2, 1954, this year, a motion was made with an attempt to vacate the dismissal of June 3, 1953. This motion was granted by Judge Hamlin on July 12th, 1954.

Now, it is the position of the Government, may it please the Court, that at least on two occasions within a period of less than two years after this accident occurred, the Government was ready, willing and able to proceed to trial. On both occasions,

because of the inability of the plaintiff, or some reason unbeknownst to the United States, the matter was put off calendar. Thereafter the matter was dismissed.

It is to be noticed in the plaintiff's affidavit to continue, or to reinstate the matter to the trial calendar, which was filed with the motion of July 2, 1954, that she states in April of 1954 she was advised by her then counsel Severson, McCallum & Davis, of the existing dismissal of June 3, 1953. However, because of some failure to meet some conditions with relation to fees between her then counsel, they desired to withdraw. Now they advised her in May of 1954, which was then the one year limitation set forth in Section 60 of the Federal Rules of Civil Procedure, of the dismissal.

The Court: That is the rule with respect to the setting aside of an order?

Mr. Woelflen: Dismissal within a year. However, nothing was done formally before this court until July 2, 1954, which was approximately 13 months after the dismissal.

Now, this motion is predicated upon the recent developments that have occurred with relation to the United States Government. The United States Government on May 29, 1952 was ready to proceed to trial on this cause. The driver of the Government vehicle, Mr. Charles Jones and government doctors who examined the plaintiff were in this area. Mr. Jones was stationed at the Hamilton Air Force Base; the doctors were likewise stationed at the Hamilton Air Force Base Hospital. For some un-

known reason the plaintiff was not ready to proceed to trial and were required again to put this matter over until September 24, 1952.

On that occasion the United States Government was once again ready to proceed to trial. It had its witnesses in the court room and the matter was continued without notice to the United States prior to the time the matter was set for trial. As far as we could ascertain some time in the morning between 9:30 and 10 o'clock—the matter was set for trial at 10 o'clock on the 24th of September, 1952,—an ex parte application was made to Judge Roche of this court and the matter was continued.

Thereafter military personnel, particularly the driver of the government vehicle, was discharged from the United States Army. We had him under what we call a hold under that period of time. We requested that if any transfers were to be made of any personnel that we be notified. We have since ascertained that the driver of the Government vehicle is attending a small college in Louisiana. He has been interrogated by members of the United States Attorneys office in that area and by the Federal Bureau of Investigation. He is very frank to admit, because this accident happened over four years ago, his remembrance of the facts surrounding it would not materially help the United States in defending this matter at the trial.

We likewise present to Your Honor the fact that during the initial stages of this proceeding between the time the complaint was filed in July 1951, until the matter was dismissed in June of 1953 this mat-

ter was actively investigated by the FBI. When the matter was dismissed the investigation by the FBI ceased. Since that time we have attempted to re-gather the leads that were hanging fire as a result of the dismissal. We are frank again to admit some of the witnesses, some of the sources of information that would materially help us in the defense of this matter have likewise disappeared.

Now, the Government is faced with the problem here of additional expense of developing this matter by way of medical by way of further use of the FBI and time of the members of the Department, of the Air Force and the Department of Justice.

We respectfully submit to Your Honor that the results in the present posture of this case is in no way occasioned by dilatory practices on the part of the United States Attorney's office. If we are to be accused of anything, the only thing we can be accused of is asking for a reasonable request of a continuance on January 7, 1953, which was approximately two years ago. From that time until the time of dismissal, or a lapse of approximately six months to the present time, there were no motions made, no contact made with the United States Attorney's office or to myself, who was personally handling this case, as to the availability or the willingness to the United States to go to trial at any time during that period of time.

The only thing we heard from the plaintiff was a motion to vacate the dismissal on June 3, 1953, which was made sometime around the early part of July, of this year.

Now, I realize that the Court has in its own discretion and pursuant to local rules, if there is lack of activity in a case, can dismiss the matter for lack of prosecution.

Secondly, if Your Honor is so inclined, in view of the fact that this matter was not restored on motion to vacate the dismissal of June 3, 1953, was not made until July of 1954, it is our contention that it was not timely made and therefore not within the provisions of 60(c) of the Federal Rules of Civil Procedure and therefore Your Honor, if Your Honor so desires, can vacate that order restoring the matter.

The Court: Did you present the matter in July of 1954?

Mr. Woelflen: No, I did not, Your Honor. Mr. Collett presented the matter.

The Court: You don't know whether or not the provisions of the Rule were called to the attention of Judge Hamlin?

Mr. Woelflen: I firmly believe that they were, Your Honor, because in Mr. Collett's affidavit, which was filed with the Court, there are several references to Rule 60(c) in the affidavit and I believe Mr. Collett has this affidavit in the record on file with the Court.

The Court: There is a serious question whether the Court has any power to set aside the order made after——

Mr. Woelflen: That's right, Your Honor. And in fact, in the first paragraph of our opposition to motion to vacate that "This motion is made, al-

though not so stated, under the provisions of Rule 60(b)(1) of the Federal Rules of Civil Procedure. Said Rule 60(b) further provides"—which goes on to refer to Rule 60(b) and likewise I believe in Mr. Collett's affidavit there is some reference to Rule 60(b). There is a recitation throughout the entire affidavit of the fact this matter was not made timely, and we respectfully submit that because of this turn of events the United States Government is faced with a very, very difficult task of defending a case that arises out of an accident which occurred four years ago. Likewise, we are in the position where we cannot adequately defend a matter which we were able to defend in May of 1952 and September of 1952. We respectfully submit, therefore, if it pleases this Court, this matter should be dismissed either for lack of prosecution or by Your Honor's order vacating and setting aside the order of July 12, 1954, reinstating the matter to the status as it existed on June 23, 1953, which was that of a dismissal.

The Clerk: State your appearance for the record, counsel.

Mr. Baker: Ralph L. Baker, attorney.

Your Honor, I was present in court when Mr. Collett argued this matter the last time it appeared before Judge Hamlin, and of course at that time the Rules were gone into, the matter was argued fully, and Judge Hamlin set aside or vacated the order dismissing the action.

Now, I personally feel that since the matter was argued and no appeal was taken from that order

that really counsel is without any grounds coming into this court at this time and asking that the order that we obtained vacating their order of dismissal be set aside. At that time the matter was argued and it appeared that Mrs. Boling, the plaintiff herself, had come into court within the one-year period set forth within the Rule. I don't know if Mr. Woelflen knows about that, Mr. Collett was present when Mrs. Boling came into court before Judge—I believe it was Judge Harris, and submitted the motion at that time to vacate within the year period. And that matter was argued at that time, and in fact we cited a case, *Elias vs. Pitucci*, 13 Fed. Rules Decision 13. In that case it said even one year, if the one-year limitation in Rule 60(b) applied to a motion under 55 (c) to set aside a default was complied with in spirit, where the motion was brought to the Court's attention at a pre-trial conference within the year, but wasn't filed until later.

Now, in that case——

The Court: Is there something in the record here that shows that the plaintiff appeared before Judge Harris within a year?

Mr. Baker: Mr. Collett was in Court when she did appear, and the last time he argued the matter he admitted that. In fact, I talked to Judge Harris' Clerk, and they have that in the record, that she appeared, and the Court gave her a minute order—that's correct—and the Court gave her a week, I believe, to get an attorney.

See, what happened, when I came into this case,

if Your Honor please, in June of this year, and there have been several other firms on the case, and problems had come up and it was more or less unfortunate, notice was sent out with respect to this motion for dismissal and my client received no notice of it until it was pretty close to the time of the expiration of the year. The attorney to whom this notice was sent didn't appear in court. Probably have a malpractice case against him, I don't know, but it was a kind of an unfortunate situation.

Now, this lady has a diaphragmatic hernia. I believe at one time the government was willing to settle, settling for around fifteen hundred.

The facts in the case are very simple. In fact, since we got into this case in June of this year we have taken quite a bit of action. After getting the matter reinstated Mr. Woelflen had Mrs. Boling's deposition taken. She came all the way from North Dakota. Then last month the only independent witness to this accident, his deposition was taken, I believe in Davis, California, and he is the only independent witness in the case, according to the Highway Patrol report, and I am sure Mr. Woelflen will go along with that. His deposition was taken at the United States Attorney's office, had a representative there at that deposition, and the facts, I believe, are very favorable; the liability is extremely clear-cut.

The defendant was driving a jeep, made a left turn on this 3-lane highway cutting into Hamilton Field when he was in the wrong lane, and this witness saw him, and his testimony is clear that he cut



in from the curb lane instead of the center lane without giving a signal and ran into my client. The facts are simple.

The Court: Well, that is almost four and a half years ago. It is a pretty stale case.

Mr. Baker: I beg your pardon?

The Court: I say it is a pretty stale case, and apparently this lady has had a number of lawyers, and at least the Government states in its affidavit here they cannot get ahold of the—got ahold of the driver, but after four and a half years his memory is not very clear on it any more. See, the case was once dismissed back in 1953 and that lulled the Government—

Mr. Woelflen: Into a sense of false security.

The Court: Into a false sense of security; they thought that was the end of the matter and the duty of prosecuting the action, of course, lies primarily on the plaintiff. I would be inclined to look with considerable question upon the testimony of the witnesses as to an automobile accident that happened four and a half years ago, because I just feel a degree of uncertainty and even suspicion about people who would probably with great exactness the facts upon which liability pins of what happened in an automobile accident four and a half years ago.

Mr. Baker: If Your Honor please,—

The Court: I just think so long a period of time has elapsed here that the action should really be dismissed. I am inclined to agree with you the record shows this lady appeared and did call the

matter to the Court's attention within the year period—wouldn't be any justification for vacating the order the Court previously made. But even since that time, that's six months ago, I would think that if counsel succeeds in getting a dismissal set aside back in July of this year that he would have proceeded expeditiously to bring the case up, because another six months has gone by.

Mr. Baker: That's right.

The Court: Really, it would have been on the dismissal calendar, if there had been a dismissal calendar called before this motion to set, which was filed a week ago.

Mr. Baker: But, if Your Honor please, when I got into the case there were no depositions taken by any of the people in the case. Then we had the lady come in from North Dakota several months ago, took the deposition in Mr. Collett's office. Then last month the deposition of the independent witness was taken. In fact, up until, I believe, a month or so ago we couldn't go to trial because Mr. Woelflen didn't know where his client was.

The Court: Didn't know where the driver was?

Mr. Baker: That's correct. I would have liked—in fact, my client has been after me, giving me long distance calls,—I would have liked to have the case go to trial several months ago. But because of the depositions and all that work, it was almost impossible, you might say, and especially where they didn't know—in fact, I called Mr. Woelflen several times to try to get his client and find him, and he told me he had written air mail, and he wrote again,

in fact, at the time I called him, so he has tried to find his client, I will give him credit. But I don't think we can be blamed for that.

Now, I just like to call——

The Court: Well, maybe you can, though, not you personally, but this has been going on, the complaint was filed four years ago. Four years ago the complaint was filed. The accident occurred October 18, 1950, and the complaint was filed just within the year, September 14, 1951.

Mr. Baker: Yes.

The Court: So there has been a long time elapsed. I don't think you can attach any fault whatsoever to the Government in the matter.

Mr. Baker: All right.

The Court: You can't blame them. That is a common human failing, you always want to say somebody else is the cause of troubles you bring on yourself.

Mr. Baker: Well, let me point out to the Court that this list of continuances that counsel has set forth looks very impressive, but unfortunately they don't seem to be described there, and counsel read them over. Now, as a matter of fact I think—and I would like to have this one opportunity to point out what the Government has actually done in this case.

The Government will show that four attorneys from the Government's office, United States Attorney's office, have handled this case. All right.

First of all, the matter was set for trial February 28, 1952. Why didn't it go to trial on that day?

The record shows, and I have a letter here, and in fact it appears from Mr. Collett's affidavit, that the reason it was continued was because Mr. Rudolph Scholtz quit the United States Attorney's office, and the matter was continued at that time to April 30. Let's see. Rudolph Scholz quit and Collett took over and there was a reason he couldn't go to trial, apparently, so the matter was continued to May 26. Scholtz made that motion to continue, I believe, on February 21, and I have a letter here that Mr. Hildebrand, I believe, wrote my client stating that he had just talked with Mr. Collett and Mr. Collett wasn't sure whether he would go to trial or not; he says the Assistant United States Attorney General, Mr. Rudolph Scholtz, who was going to try your case, has just quit the Government and the case has been turned over to another assistant by the name of Collett with whom I talked this morning. He was uncertain as to whether he could be ready for trial, and it seems to me that he probably has a good excuse to ask the judge to postpone the case for a couple of weeks.

Now, that case was set for April 30 to go to trial, their own attorney quit, and so the matter was continued and that was all right.

Then on April 25—it didn't go to trial on April 30 because Schlotz, so it was set over to May 26th. Then on April 25 Collett made a motion—that was when he made the motion. Then the matter was going to go to trial on May 28 and it appeared that there was no court.

So the first two or three continuances, if Your

Honor please, were—I don't want to use the word "fault", but they were on the part of the Government. They were the ones that continued the case. Then the matter came up for trial and apparently some new matter came up and the attorney wasn't prepared to go to trial, and it didn't go to trial and *he continuance* and the matter was put off calendar to be reset, and the matter was continued.

The irony of the situation, comes to the surface now, the case was finally set to go to trial on January 7th, 1953,—that is last year—the case was set to go to trial. In fact, I believe at that time everybody was getting ready to go to trial. Then what happened? Mind you, if Your Honor please, this is an extremely important point in this case. The last time this case was set for trial was last year. At that time, of course, I would think——

Mr. Woelflen: Two years ago, almost.

Mr. Baker: It was set for January 7, 1953; isn't that last year?

Mr. Woelflen: Almost two years.

Mr. Baker: Well, it's last year, isn't it? In other words, this was set for January 7, 1953, last year, if Your Honor please, to go to trial. All right. Now, certainly the Government at that time was ready to go, apparently. Then the irony comes out. Now, I have a letter before me signed by Mr. Woelflen dated December 30, 1952, about a week before this case was going to go to trial, in which he states, writing to Hildebrand:

"Gentlemen: The above matter is set for trial on January 7, 1953, in Federal Court in San Fran-

cisco. This matter was originally assigned to Mr. Doll of this office; however, Mr. Doll is resigning as an Assistant United States Attorney effective January 1, and this case has been assigned to me for trial.

"I am presently scheduled to commence a rather lengthy Federal Tort Claims trial on January 6th. As the office staff is diminished it will be impossible for anyone else to conduct the trial on January 7. Therefore, we would appreciate it if you would sign the enclosed stipulation extending time to a date that would be more convenient."

So really the last time the case was up for trial Mr. Woelflen himself wrote the letter, and I have his signature here on this letter, in which he asks the matter be continued. That was the second time this case was continued because an attorney in the United States Attorney General's office had resigned or quit.

Now, this case has been kicked around in court since, both sides have had a number of attorneys on it. It is unfortunate. But I don't think Mrs. Boling should be blamed or that she should be deprived of her day in court. She has a diaphragmatic hernia; in fact, since I took this case over, Your Honor please, I have been indebted, and I can show you the bills if Your Honor would like to look at them, of \$255 for medical examinations that this lady has had. Now, if this case doesn't go to trial, I am going to have to pay for those. Now, I don't come in here for any sympathy, but we have tried conscientiously to prepare this case for trial,

and then here at the last minute they were the ones.

Then, within four and a half months after they did that they apparently knew the trouble she was having with these attorneys, trying to get the thing cleared up, then he went into court, at least, and some matters came up and nobody came into court in behalf of Mrs. Boling. She wasn't notified and she didn't appear, she didn't know about it.

The Court: The Clerk always sends out notices.

Mr. Baker: Her attorneys apparently got it.

The Court: That's not the obligation of the Government.

Mr. Baker: No, that may be.

The Court: Because sometimes the Government's cases are dismissed, too, for lack of prosecution.

Mr. Baker: That may be, but——

The Court: In fact, the fact that it came up in June of 1953 for dismissal was because of the fact that, according to our rules of dismissal, no procedure had been taken within the previous six-month period.

Mr. Baker: That may be.

The Court: Automatically they came up on the dismissal calendar.

Mr. Baker: That well may be, I am sorry on that point——

The Court: So really there has been, despite the fact of your statement, it was last year, there really hasn't anything happened in two years, because all of 1953 and all of 1954 is past and all that happened during that time was that on January 6, 1953, the trial went off calendar. Then the Clerk

sent out the notice on May 23, 1953, that the case would be on the dismissal calendar, and on June 3, 1953, the complaint was dismissed for lack of prosecution. Then 13 months went by and a motion was filed to vacate the order. That was granted in July of 1954.

Mr. Baker: That's right.

The Court: Now, it is pretty well getting into the third year and still all we have on now is a motion to—we were here last week or the week before on a motion to set.

Mr. Baker: That's right, we would like to set it and get the thing moving here. In fact, we have just gotten to this case for about six months and got it at least coming up for trial and had the lady examined. We are more or less set to go. I would like to really go ahead and have this case cleaned up, and it doesn't seem fair to Mrs. Boling, at least, the plaintiff here, who suffered a personal injury, that is suffering at the present time, that needs an operation, that she would be deprived of her day in court.

The Court: I don't think there is any deprivation of her day in court at all. I just think this is a stale case, counsel.

Mr. Baker: That's right, I agree there, Your Honor.

The Court: I think it has no longer any place on the calendar. I don't know what was presented to Judge Hamlin, but——

Mr. Baker: Well, now, that is another point. This thing was hashed out——



The Court: I don't know what appealing circumstance was submitted to him, but a year has gone by and apparently neither the lady nor any attorney on her behalf did anything within that period of time.

Mr. Baker: She is a traveling salesman, she travels quite a bit, that is the problem. In other words,—oh, that was another point, they sent her mail from Severson's office, but they put the wrong name on it so it didn't get to her. That was another thing that was unfortunate in this case, and you might say comes under that section of excuse or neglect, at least it was justifiable—there was justifiable cause for—I think I have the thing right here where—in other words, you can bring it up within a year if there is a mistake.

There was a mistake in her name. In other words, they tried to contact her; because they had written her name wrong it did not get to her and that was an unfortunate thing. If they were able to contact her this probably would never have occurred. That's true. That's unfortunate, but I don't believe she should be blamed for that. So within this year section, at least, and this is what we argued before Judge Hamlin—in fact, I don't know if I should have gone into all these details here about Mr. Woelfien's letter, etcetera, because we brought this out before Judge Hamlin. He saw the lady came in within one year, made the motion to vacate under this section here which she had been advised by her attorney, and Judge Hamlin, for that reason, va-

cated the dismissal, and I think that order ought to stand. They didn't appeal it——

The Court: I agree with you on that, counsel, I think that order should be vacated in view of the statement that the lady did appear, but——

Mr. Baker: And since then we have tried to try this case. I honestly have, Your Honor; I have put forth a lot of effort. There hasn't been any failure on my part to prosecute it, I have been prosecuting since I took over in June. I put forth every effort. Since Judge Hamlin put that on the calendar we have tried. And what have we done? We have written interrogatories we filed with the Government and they returned them to us. That's right. We have even done that since I have been in it. They gave us written interrogatories. I had my client sign those. So we have accomplished quite a bit. During the other years and the other attorneys, I don't cast reflection on them, but nothing has been done. Depositions have been taken, Mrs. Boling and an independent witness, written interrogatories on both sides have been done within the six months' period. If Your Honor please, I have not failed to prosecute this case, I put forth a lot of effort. I have had her examined by three doctors, Dr. Simpson, Dr. Lawrence and another doctor—three doctors—and I have been billed for those, and I feel that I have prosecuted this case.

The Court: You came into the case at the time it appeared before Judge Hamlin for the first time?

Mr. Baker: That's right. And since then I have prosecuted it very, very diligently and the record

shows we have accomplished quite a bit, and I think the order should stand, and I feel we ought to be able to put this matter on.

The Court: You probably have been diligent enough in the matter; I just think this case should have been dismissed a long time ago.

Mr. Baker: That is possible; that is possible, that is possible, but—I feel, though——

The Court: The Government has, of course, great resources at its command; yet it still is at a serious disadvantage in this case.

Mr. Baker: We do appreciate that.

The Court: Aside from one or two continuances there which——

Mr. Baker: There were about three of them, and one——

The Court: Well, they only covered a very short portion, just a period of over two or three months.

Mr. Baker: The last one was last year, January 7th, 1953.

The Court: That is two years ago.

Mr. Baker: That's right.

The Court: The Government has been placed at a serious disadvantage by this long period of time.

Mr. Baker: We are, too.

The Court: To be perfectly frank about it, if this were a private defendant I wouldn't hesitate a moment to grant a motion to dismiss because I don't think that any private litigant should be put to the disadvantage that the Government is put to in trying to meet a case as old as this.

Mr. Baker: The plaintiff, though, isn't——

The Court: The Government, however, is supposed to be able to stand up under some of these things, but it isn't right.

Mr. Baker: I appreciate that, Your Honor.

The Court: If this case should go on and if I were to try the case I think you would have to have a pretty convincing case to satisfy me that I was hearing the truth——

Mr. Baker: That may be.

The Court: ——in a case that is as old as this, or that I had sufficient wisdom to be able to evaluate the testimony with respect to an automobile——this was an automobile accident?

Mr. Baker: That is right, Your Honor.

The Court: Collision that happened four and a half years ago.

Mr. Baker: But, if Your Honor please, I don't say this to be repeating myself, but I do cast some reflection on what the defendant himself said that he doesn't remember. I am pretty sure he remembers in making that left turn without a signal from the curb lane. It is very simple; in fact, the independent witness—you see, the liability is very good in this case, and in fact they wanted to settle it at one time. And I feel he can remember that. It isn't one of these cases where you have a lot of factors involved, it is very simple. He made a left turn to go into Hamilton Field.

The Court: All right. You think there would be any possibility of making some moderate adjustment in this case?

Mr. Baker: There may be a chance to make a settlement.

Mr. Woelflen: I don't know, Your Honor. I am frank to admit that on October 7 of this year—I don't want to prolong this argument—we took the deposition of Mrs. Boling and at that time there developed certain conditions, physical conditions which she alleged or attributed as a result of this accident which we were in no way apprised of as of the time of the commencement of this action, or at the time she was originally examined.

Now, the four-year period has expired. Are these attributable to the accident? Are they attributable to other conditions? That is the position we are faced with.

The Court: I see great difficulty.

Mr. Woelflen: We cannot evaluate it in dollars and cents, because she says this is my condition, the doctors says it isn't her condition, or we can't tell, and that is what we are faced with now.

And secondly, Your Honor, there have been a lot of excuses made for the plaintiff, but this plaintiff, if she were interested in her case, she wouldn't allow a lack of contact with her attorneys go by for a period of almost 12 months with no attempt to find out what the status of her case was. If she wrote to her attorneys, she could have asked what was the status of her case, when is it coming up for trial, and she certainly would have found out it was dismissed.

The Court: I think I have heard enough. I will

give the matter some further consideration and mark it submitted.

Mr. Woelflen: Thank you, Your Honor.

[Endorsed]: Filed May 4, 1955.

---

[Endorsed]: No. 14727. United States Court of Appeals for the Ninth Circuit. Eva Rose Boling, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: April 14, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

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In the United States Court of Appeals  
for the Ninth Circuit

No. 14727

EVA ROSE BOLING,

Plaintiff and Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant and Respondent.

### STATEMENT OF POINTS

1. The United States District Court, Northern District of California, Southern Division, in its Orders entered and filed with the Clerk of said

Court on December 29, and December 30, 1954, and the Amendment thereto filed with said Clerk in the above named cause on January 14, 1955, was erroneous in the following respects:

(a) It was error of the court to take into its consideration the events that transpired prior to July 12, 1954;

(b) The court lacked jurisdiction to make its orders on matters that transpired prior to July 12, 1954.

(c) The court's action dismissing the cause herein was arbitrary and capricious and wholly unsupported by the facts of the case.

April 14, 1955.

/s/ NUBAR TASHJIAN,  
Attorney for Plaintiff and  
Appellant

[Endorsed]: Filed April 14, 1955. Paul P. O'Brien, Clerk.





**No. 14,727**  
**United States Court of Appeals**  
**For the Ninth Circuit**

---

EVA ROSE BOLING,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

**Appeal from the United States District Court for the  
Northern District of California,  
Southern Division.**

**BRIEF FOR APPELLANT.**

---

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**FILED**

**SEP 12 1955**

**PAUL P. O'BRIEN, CLERK**



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No. 14,727

**United States Court of Appeals  
For the Ninth Circuit**

---

EVA ROSE BOLING,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

**Appeal from the United States District Court for the  
Northern District of California,  
Southern Division.**

**BRIEF FOR APPELLANT.**

---

**JURISDICTION.**

Plaintiff-appellant appeals from an order of the United States District Court for the Northern District of California, Southern Division, entered on the 30th day of December 1954, dismissing appellant's complaint with prejudice for lack of prosecution, and an order of the District Court entered the 29th day of December 1954, granting defendant-appellee's motion to dismiss for lack of prosecution and the amendment thereto entered the 14th day of January 1955.

Jurisdiction is conferred upon this Court to hear this appeal by virtue of Title 28, U.S.C.A., Sec. 1291.

**STATUTES AND RULES INVOLVED.**

Federal Rules of Civil Procedure for the United States District Courts, Title 28 U.S.C.A.

Rule 41(b). Dismissal of Actions—Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

Rule 60(b). Relief From Judgment or Order—Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (3)

fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for the reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., sec. 1655, or to set aside a judgment for fraud upon the court . . .

---

#### **STATEMENT OF CASE.**

Appellant filed complaint for damages against the United States on the 31st day of July 1951 under the authority of the Federal Tort Claims Act, Title 28, U.S.C.A., sec. 1346(b), and sec. 2671. On the 3rd day of June 1953 appellant's cause was dismissed for lack of prosecution. On the 12th day of July 1954, the court below, after hearing appellant's motion to vacate the court's order of dismissal of June 3, 1953 and to revive appellant's cause, made its order vacating the order of dismissal of June 3, 1953 and ordered the cause revived. This proceeding was vigorously opposed by defendant appellee. Thereupon, the par-

ties herein made their preparations for trial on the merits of appellant's cause.

On the 10th day of December 1954, appellant filed notice and motion to set her cause for trial, and this motion was heard on the 20th day of December 1954. Since the appellee opposed this motion vigorously on the grounds that they were not yet ready to defend in this action, the court below ordered appellant's motion to be continued to the 24th day of January 1955. On the 22nd day of December 1954, only two days after the hearing on appellant's motion to set, appellee filed notice and motion in the court below for dismissal of appellant's cause for lack of prosecution, with an order attached showing date of service. This motion was heard, argued and submitted in the court below on the 27th day of December 1954. That court then issued its order on the 30th day of December 1954, and the 29th day of December 1954 with an amendment thereto dated the 14th day of January 1955, granting appellee's motion and dismissing with prejudice appellant's complaint for lack of prosecution. And on the 25th day of February 1955 appellant noticed her appeal.

---

### **ISSUES PRESENTED.**

Appellant's statement of points is resolved into these basic issues:

1. Did the District Court abuse its discretion by dismissing appellant's complaint for lack of prosecution?



2. Was the District Court precluded from basing its orders on events that transpired in this action prior to the 12th day of July 1954?

---

### ARGUMENT.

#### I. ABUSE OF DISCRETION.

Federal courts have consistently held that it is within the sound discretion of the trial court to dismiss a complainant's cause of action where the complainant has failed to prosecute his action with reasonable diligence. This power of dismissal for lack of prosecution rests in the inherent powers of the court and is expressly conferred by Rule 41(b) of the Federal Rules of Civil Procedure. On appeal, relief from such a dismissal will be granted if the court below has abused its discretion.

*Shotkin v. Westinghouse Elec. & Mfg. Co.*, 169 F. 2d 825;

*Hicks v. Bekins Moving & Storage Co.*, 115 F. 2d 406;

*U. S. v. Pacific Fruit & Produce Co.*, 138 F. 2d 367;

*Timmons v. U. S.*, <sup>194</sup>~~195~~ F. 2d 357, Cert. denied 73 S.Ct. 59, 344 U.S. 844, 97 L.Ed. 656, Re-hearing denied 73 S.Ct. 174, 344 U.S. 882, 97 L.Ed. 383;

*Red Warrior Coal & Min. Co. v. Boron*, 194 F. 2d 578;

*Peardon v. Chapman*, 169 F. 2d <sup>709</sup>~~902~~.

Appellant's cause of action was revived by order of the court below on the 12th day of July 1954, over the vigorous opposition of appellee (T.R. pp. 15-19, 47-55). Subsequent to the revival of appellant's action, both parties took steps to prepare for trial including the taking of depositions and interrogatories (T.R. p. 5). Nowhere in the record of this matter from the date of revival of appellant's cause to the date of its dismissal on December 29, 1954, does it appear that appellant lacked diligence or sat upon her rights.

Indeed, the record for that period of time shows the parties to be unusually active in preparing appellant's cause for trial.

On December 10, 1954, less than five months from the date of restoration of appellant's cause, appellant filed her motion to set her cause for trial and appellee appeared in opposition at the hearing of this motion on the 20th day and obtained a continuance (T.R. p. 5). Appellee's affidavit in opposition to appellant's motion to set cause for trial (T.R. pp. 20-25) lucidly explains appellee's unpreparedness for trial and asks the court for a continuance upon this ground. Nowhere in that affidavit does there appear a hint or suggestion that appellant has been derelict in the prosecution of her cause. The appellant had demonstrated her willingness to pursue her revitalized cause with dispatch, and appellee by his own admission was unprepared for trial. Only two days after the hearing on appellant's motion to set, and only two days after appellee's ready assertion that he was unprepared for trial, appellee asserted the astounding

proposition that appellant's cause ought to be dismissed for lack of prosecution! Appellee submitted his new-found proposition to the court below on December 22, 1954 in the form of a motion, supported by affidavit, to dismiss appellant's cause for lack of prosecution, and the hearing on this motion was set before the court below for the 27th day of December 1954 (T.R. pp. 27-35).

Appellee's affidavit (T.R. pp. 31-35) in support of his motion to dismiss appellant's cause is submitted to the inspection of this Court. Nowhere in that affidavit does there appear the suggestion that appellant lacked diligence. It simply again expresses appellee's unpreparedness for trial and this is made the grounds for a dismissal of appellant's cause.

The District Court's order granting motion to dismiss, dated December 29, 1954 (T.R. p. 36) and the amendment thereto dated January 14, 1955 (T.R. p. 38) does not indicate in what manner appellant was derelict after the restoration of her cause on July 12, 1954. The court below said (T.R. p. 36) "At all times since the cause was at issue the calendar of this court was such that the cause could have been set for trial and promptly tried." And in its amendment to its order of December 29, 1954, the court further said ". . . the basis for the order was the conclusion that the entire record of this proceeding shows that there has been a failure to diligently prosecute the action and that the cause has become stale."

Nor does the District Court's order dismissing appellant's complaint with prejudice contain any allega-

tion of how the appellant was derelict in prosecuting her cause, other than a brief assertion that the court's order was made dismissing the action for failure to prosecute.

Yet this very same court ordered reinstatement of appellant's cause after a full hearing, and now fails to show in what respect appellant failed to diligently prosecute. The only difference in the court below that reinstated from that of the court that dismissed was one of personnel.

It is submitted to this Court that appellant was diligent in prosecuting her cause after restoration, and appellee has not claimed nor found the appellant to be derelict in prosecuting her cause. Indeed, appellee makes citations only of his own unpreparedness and none whatever of appellant's.

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**II. THE COURT BELOW WAS PRECLUDED FROM BASING ITS ORDER ON EVENTS THAT TRANSPIRED IN THIS ACTION PRIOR TO THE TWELFTH DAY OF JULY, 1954.**

It is submitted to this Court that the court below was precluded from treating appellant's cause as though the order of restoration on July 12, 1954 was never made. An order of restoration was in fact made on July 12, 1954 upon notice and motion, a hearing was had, and appellant's cause was restored over vigorous opposition of appellee (T.R. pp. 17-19, 47-55).

It will be noted that the grounds of appellee's motion to dismiss for lack of prosecution filed the

22nd day of December 1954 is, among other things, “. . . most particularly the affidavit of Charles Elmer Collett, Assistant United States Attorney for the Northern District of California, dated July 12, 1954, which affidavit was filed in opposition to plaintiff’s motion to vacate the order of dismissal . . .” Appellee’s motion to dismiss is an independent motion having no relationship to appellant’s former motion to reinstate. The argument which failed the appellee on July 12, 1954 is again resorted to by appellee. Shall a thing adjudged have no sanctity?

Black’s Law Dictionary, Third Edition, at page 1540 defines *res judicata* as “a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment.”

The doctrine of “*res judicata*” is the technical formulation of public policy that there be an end to litigation, that a contested issue once settled shall be binding upon the parties thereto, that matters once tried shall be considered forever settled.

*Spilker v. Hankin*, 188 F. 2d 35, 38, 88 U.S. App. D.C. 206;

*Partmar Corp. v. Paramount Pictures Theaters Corp.* (Cal.) 74 S.Ct. 414, 415, 347 U.S. 89, 98 L.Ed. 532;

*U. S. v. Bower*, 95 F. Supp. 19, 20.

It is not contended by appellant that the court below was precluded from examining the entire record of this cause in determining whether appellant had been derelict in prosecuting her cause after its restoration on July 12, 1954. It is appellant’s contention

that the court below was bound by its own determination of July 12, 1954 and could only consider the appellant's activity subsequent to July 12, 1954, and, if necessary in the light of the entire record of this cause. However, appellee and the court below treated the determination of the District Court of July 12, 1954 lightly, if at all, and indeed it would appear as though appellant's cause were tried as though it were coming upon the dismissal calendar for the first time.

The finding of the court below on July 12, 1954 that appellant's case was entitled to be restored was binding upon the parties hereto of all the issues there determined or that could have been there determined. And the court below erred in not limiting itself to the appellant's activity subsequent to the restoration of appellant's cause of action.

*Boyce v. Boyce*, 18 Atl. 2d 298, 299, 19 N.J. Misc. 143.

After the restoration of appellant's cause on July 12, 1954, appellee sought no rehearing of the court's order of restoration but went ahead as though the case had been in fact restored and prepared its case for trial. Both parties to the action, in good faith, prepared for the trial of appellant's cause, until appellee found the task of preparing its case too arduous and applied for a dismissal of appellant's cause.

Were the District Court's order of restoration of July 12, 1954 meaningless, then we must subscribe to the theory that no litigation is final and all issues may be interminably litigated and relitigated with no re-

gard to the harassment caused to parties litigant, not to mention the chaos that may be heaped upon the courts.

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### CONCLUSION.

1. The court below abused its discretion by ordering dismissal of appellant's cause, for it is nowhere demonstrable that appellant lacked diligence.

2. The court was precluded from basing its order of dismissal upon the entire record of this cause, rather than upon the performance of appellant subsequent to the restoration of her cause. It was error of the court below to disregard its findings upon its order of restoration of appellant's cause on July 12, 1954.

Dated, San Francisco, California,  
September 12, 1955.

RALPH L. BAKER,  
J. ADRIAN PALMQUIST,  
NUBAR TASHJIAN,  
*Attorneys for Appellant.*





No. 14,727

United States Court of Appeals  
For the Ninth Circuit

EVA ROSE BOLING,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

BRIEF FOR APPELLEE.

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FILED  
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PAUL P. O'BRIEN, CLERK



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# United States Court of Appeals For the Ninth Circuit

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EVA ROSE BOLING,

VS.

UNITED STATES OF AMERICA,

*Appellant,*

*Appellee.*

---

## BRIEF FOR APPELLEE.

---

### STATEMENT OF THE CASE.

The appellant's statement of the case as recited in her brief with respect to the history of the instant lawsuit is essentially correct. However, the brevity of that statement does not give a true picture of the background of this litigation. This appeal deals solely with the propriety of the District Court's order dismissing the appellant's suit against the United States for want of prosecution. Therefore it is only proper that the entire chronicle of this extended litigation be called to the Court's attention. The appellee believes that the docket entries (R. 3-7) eloquently speak for themselves and constitute the true and complete "statement of the case" in this cause.

## ISSUES PRESENTED.

It is the position of the appellee that:

(1) The District Court did not abuse, grossly or otherwise, its judicial discretion in dismissing appellant's complaint and cause of action for lack of prosecution;

(2) The District Court was not precluded from basing its orders of dismissal on events that transpired in this litigation prior to July 12, 1954.

---

## ARGUMENT.

### I. THERE WAS NO ABUSE OF DISCRETION IN GRANTING DISMISSAL.

The appellee does not take issue with the appellant's assertion, as stated in her brief (App. Op. Br.,\* p. 5), that a trial court is inherently endowed with discretionary powers in dismissing litigation when diligent prosecution thereof is lacking. The appellant's citations, with which the appellee has no quarrel, amply support this proposition. We do not, however, agree with appellant's contention that mere abuse of discretion will alone suffice to reverse an order on appeal. In one of the leading cases on this subject, *Hicks v. Bekins Moving & Storage Co.*, 115 F. 2d 406 (9th Cir., 1940), this Court has held (at p. 409):

“... Unless it is made to appear that there has been a *gross* abuse of discretion by the trial court in dismissing an action for lack of prosecution,

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\*Appellant's Opening Brief.

its decision will not be disturbed on appeal.”  
(Emphasis added.)

*Sweeney v. Anderson*, 129 F. 2d 756 (10th Cir., 1942).

The burden rests with the appellant to establish that, in granting the government's motion to dismiss for want of prosecution, the District Court *grossly* abused the discretionary power with which the appellant concedes it is inherently endowed. See *Gurst v. San Diego Transit System*, 119 Cal. App. 2d 51 (1953).

A review of the record and reading of appellant's brief discloses no conduct on the part of the trial court that could in any way be considered a manifest or gross abuse of discretion in dismissing the appellant's complaint and cause of action. No where does the appellant, by suggestion or inference, contend that the dismissal was a result of arbitrary, fanciful or clearly unreasonable conduct on the part of the District Court. The presence or absence of such conduct is determinative of whether or not there was a gross abuse of discretion.

*United States v. McWilliams*, 163 F. 2d 695  
(D.C. Cir., 1947).

The appellant, in arguing in favor of reversal, asserts that her case was actively prosecuted from July 12, 1954, to December 29, 1954, and that this is sufficient to establish that there was no lack of prosecution so as to justify the District Court's granting appellee's motion to dismiss. This argument begs the

issue. The entire record must be considered in determining the propriety of the disputed order. An isolated five-months period of activity during approximately three and one-half years of litigation, is not sufficient to establish that there has been diligent prosecution on the part of the plaintiff *at every stage* of the proceedings. The fact that appellant was stirred into action after having one order of dismissal for lack of prosecution set aside, together with the attendant possibility that a similar order would be rendered against her if she did not expeditiously terminate her litigation, is no excuse for her past derelictions. (*Hicks v. Bekins Moving & Storage Co.*, supra.) Appellant's argument in this respect overlooks the duty imposed upon her to promptly dispose of her lawsuit from the very moment of its inception.

The clerk's docket shows (R. 4) that in 1953 the trial of January 3, 1953, was ordered off calendar at appellee's request. Thereafter appellant did nothing to prosecute her cause for a period of approximately eighteen months, or until June 1, 1954, when she made an ex parte application to have the dismissal of June 3, 1953, set aside (R. 42-47). This manifest lack of interest on the part of appellant refutes any contention on her part that she diligently prosecuted her lawsuit during every stage of its existence.

The appellant complains (App. Op. Br., p. 8) that the District Court did not indicate, in granting the motion to dismiss, the manner in which she was derelict in prosecuting her complaint. This assertion



is unfounded. The Court, in the order of dismissal of December 29, 1954 (R. 35-37), and in its amendment thereto of January 14, 1955 (R. 38-39), stated that the case was being dismissed because of the lack of activity on the part of the appellant, as evidenced by the entire record. Even before entering its formal order of dismissal, the District Judge indicated in open Court that he was inclined to dismiss because the case was then "stale". Appellant's counsel at that time and one of her counsel in this appeal agreed with the Court's, then, appraisal of the case (R. 72). Appellant was fully apprised and was more than adequately aware as to why her case was dismissed. It was not error on the District Court's part to omit spelling out, item by item, the derelictions committed by appellant; the record spoke for itself. In finding as it did, the Court was fulfilling one of the fundamental prerequisites as to the proper administration of justice—that there be an elimination of delay in the trial of cases and that the business of the courts be promptly dispatched by litigants.

*Sweeney v. Anderson*, supra.

Appellant contends that the affidavit of appellee in support of its motion to dismiss is devoid of any suggestion or showing that the appellant had been dilatory in prosecuting her lawsuit against the United States government. This assertion is not entirely correct. In this respect the appellant has studiously avoided any reference to the appellee's memorandum of points and authorities (R. 26-30) which accompanied the questioned affidavit. The Court's attention

is invited to this memorandum. It is hardly conceivable that anyone, after reading this document, would be unaware or misinformed as to the grounds on which the motion to dismiss was being presented to the Court. Such an argument as this has no bearing on the issues raised in this appeal. It only tends to becloud—a very clear and well established point of law concerning the inherent judicial power of courts to dismiss delayed litigation.

The argument of the appellant that the orders now appealed from were entered in the exercise of an abuse of judicial discretion is without merit. A reading of the record in this case, and an examination of appellant's brief, fails to establish any gross abuse of discretion on the part of the District Court in granting dismissal of this cause. As has been stated in *Hicks v. Bekins*, supra, in the absence of such a showing, an order such as is now before this Court for review is not susceptible to reversal on appeal.

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**II. THE DISTRICT COURT WAS NOT PRECLUDED FROM BASING ITS ORDER OF DISMISSAL ON EVENTS THAT TRANSPIRED IN THIS LITIGATION PRIOR TO JULY 12, 1954.**

In her second specification of error (App. Op. Br., pp. 8-11), appellant argues that the District Court on December 29, 1954, was bound by a prior order of July 12, 1954, which restored her cause to the trial calendar, as an adjudication that there had been no want of prosecution at *any* time by the appellant. The appellant asserts that the order of July 12, 1954, was res judicata as to any question relative to appel-

lant's diligence or lack thereof in prosecuting her lawsuit against the United States. This proposition of appellant is based entirely upon the false premise that the order of restoration of July 12, 1954, was a final judgment.

Stripped of all of its legal refinements, the doctrine of *res judicata* is applicable only where there has been a *final* judgment after a full hearing on all the issues.

*Heiser v. Woodruff*, 327 U.S. 726, 733 (1944);  
30 Am. Jur., *Judgments*, § 172 (1940).

It cannot in any way be held that the order of Judge Hamlin made on July 12, 1954 (R. 15) was a final judgment so as to afford application of the doctrine of *res judicata* in this instance. The order was purely preliminary to any final adjudication on the merits; it simply settled a procedural defect in the litigation. The restoration order in no way touched upon the substantive rights of the parties as framed by the complaint and the answer. At the most the order was interlocutory.

“An interlocutory judgment or order is one which is made before a *final* decision, for the purpose of ascertaining a matter of law or fact, preparatory to a final judgment, or which determines some preliminary or subordinate point or plea, or settles some *step*, question or *default* arising in the progress of the cause, but *does not* *adjudicate the ultimate rights of the parties* or finally puts the case out of Court.” (Emphasis added.)

*Taylor v. Breese*, 163 F. 678 (4th Cir. 1908):  
31 Am. Jur., *Judgments*, § 434 (1940).

The order of July 12, 1954, was in effect a step which set aside appellant's default in allowing her case to be dismissed for lack of prosecution on June 3, 1953.

An interlocutory judgment or order is not susceptible to the defense of res judicata.

*United States v. U.S. Smelting Co.*, 339 U.S. 186, 199 (1950) ;

*United States v. One 1946 Plymouth Sedan*, 167 F. 2d 3 (7th Cir. 1948).

The appellant states (App. Op. Br., p. 10) that in failing to seek a rehearing or appellate review of the order of restriction, the appellee is bound by its effect. The order, being interlocutory, was not in and of itself subject to appeal.

28 U.S.C. §§ 1291-1292.

The appellee's so-called failure to seek review of a non-appealable order was of no consequence and in no way limited its right to seek the recourse which it sought in subsequently moving for dismissal for want of prosecution.

The appellant's second specification of error is untenable and can in no way buttress her argument that the orders of dismissal were granted through the abuse of discretion on the part of the District Court.

**CONCLUSION.**

The record in this case and the arguments propounded by appellant fail to disclose that the District Court grossly abused its inherent judicial power in granting the dismissal in question. Likewise the District Judge, in granting the order of dismissal, was not bound by the order of July 12, 1954, under the doctrine of res judicata, but was fully justified in reviewing the entire record of this proceedings as an aid in determining there was want of prosecution on the part of the appellant.

The appellee respectfully submits that the orders appealed from should be affirmed.

Dated: San Francisco, California,  
October 3, 1955.

Respectfully submitted,

LLOYD H. BURKE,

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FREDERICK J. WOELFLEN,

Assistant United States Attorney,

*Attorneys for Appellee.*



No. 14728

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

WILLIAM MAYS,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## APPELLEE'S BRIEF.

---

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No. 14728

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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WILLIAM MAYS,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## APPELLEE'S BRIEF.

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### I.

#### JURISDICTIONAL STATEMENT.

In February, 1954, appellant William Mays, Everett Skeeters, C. L. Cox, Peter Hampton Gourley, and Herbert Marcellus Hogan were indicted in the United States District Court in and for the Southern District of California by the Grand Jury for a violation of United States Code, Title 18, Section 371, and Title 12, Section 95(a). The first count under Section 371 charged the defendants with conspiring to acquire and transport gold bullion [Clk. Tr. pp. 2-4], and the second count charged them with

wilfully and knowingly holding and transporting approximately 350 troy ounces of gold bullion, estimated .850 fine, in Riverside County, within the Central Division of the Southern District of California [Clk. Tr. pp. 4-5]. The District Court had jurisdiction of the cause under Section 3231 of Title 28, United States Code, which confers on the District Courts original jurisdiction "of all offenses against the laws of the United States."

A trial by jury was had upon the above indictment, the Honorable Ernest A. Tolin, Judge presiding. Everett Skeeters was found not guilty on both counts; Herbert Marcellus Hogan was found not guilty as to Count One and guilty as to Count Two; C. L. Cox was acquitted on motion before submission of the case to the jury; and Peter Hampton Gourley entered a *nolo contendere* plea to Count Two of the indictment prior to trial. The verdict on June 22, 1954, as to appellant William Mays was not guilty as to Count One and guilty as to Count Two. By Judgment and Commitment filed July 19, 1954, appellant received five years' probation, sentence of one year and one day having been suspended [Clk. Tr. p. 11].

On July 29, 1954, the appellant filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit [Clk. Tr. pp. 12-13]. He thereafter filed a designation of points on appeal [Clk. Tr. pp. 14, 15, 16] and a designation of contents of record on appeal [Clk. Tr. pp. 18-19]. The United States District Court made its order excusing the prepayment of costs and fees and providing

that appellant could appeal *in forma pauperis* [Clk. Tr. p. 20].

This Court has jurisdiction under the provisions of Title 28, United States Code, Section 1291.

## II.

### THE STATUTE INVOLVED.

The indictment was brought under Section 95(a) of Title 12, United States Code, which will not be set forth herein verbatim because of its length. However, it does provide in pertinent part as follows:

“Section 95(a). *Embargo on bullion or coin*; hoarding; requirement of disclosure; penalty (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

“(A) investigate, regulate or prohibit the importing, exporting, hoarding, melting, or earmarking of *gold or silver coin or bullion*, currency or securities \* \* \*.” (Emphasis added.)

*Executive Order No. 6260*, passed August 28, 1933, is published in the United States Code Annotated immediately following Section 95(a) at page 451 and relates to “Hoarding, Export, and Earmarking of Gold Coin, Bullion, or Currency; Transactions in Foreign Commerce.” In effect the Order provides, among other things, that after the date of the Order no person could acquire or

hold gold coin, gold bullion, or gold certificates except pursuant to licenses issued by the Secretary of the Treasury subject to such further regulations as he would prescribe.

Pursuant to the above Act and Executive Order, regulations were promulgated by the Secretary of the Treasury, and those governing the dates of the transactions in this case are contained in 13 Federal Register (hereinafter cited as F. R.), pages 2742 to 2750 (31 C. F. R. pp. 261 to 267). However they were substantially amended on September 29, 1952, in 17 F. R., pages 7888 to 7896, which amendments were in effect on the dates involved herein.

Other amendments to the regulations are found as follows:

- (1) 17 F. R., page 8039 (Sept. 5, 1952);
- (2) 17 F. R., pages 11441 to 11442 (Dec. 17, 1952);
- (3) 18 F. R., page 3366 (June 11, 1953);
- (4) 18 F. R., page 5134 (Aug. 27, 1953).

The penalty provision of Title 12, United States Code, Section 95(a), is set forth in Section 54.11(b) and is expressly stated to be applicable to the regulations.



III.  
ARGUMENT.

A. The Question of the Nature of the Substance in Government's Exhibits I, II and III Was Properly Submitted to the Jury.

By its very definition in Section 54.4 of 17 F. R., page 7889 "gold bullion" is a catch-all phrase which includes at least several different types of gold. Specifically, the Regulation states that the term "\* \* \* includes, *but not by way of limitation*, semi-processed gold and scraps of gold \* \* \*." (Emphasis ours.) It then goes on to definitely eliminate (1) fabricated gold, (2) metals with less than five troy ounces per ton, and (3) unmelted gold coin. Therefore, we are obviously not precluded in this definition from finding that gold in other forms than those specified may be included in the words "gold bullion." This would, of course, mean a consideration of whether the gold had been "smelted or refined" and whether its value depended "primarily on the gold content and not upon its form." Under the circumstances of this case, these were all questions which had to be submitted to the jury. In fact, this was done by the Court without any objection from, and even with the request of counsel. Judge Tolin read the pertinent regulations relating to the various definitions of different types of gold to the jury [Rep. Tr. pp. 105-109]. Subsequently Mr. Cooper, who represented a defendant other than appellant, objected that the Court had instructed the jury as a matter of law the gold in question was "gold bullion" [Rep. Tr. p. 119].

He then said, "It is my understanding of the law, it is a question of fact for the jury." Counsel for appellant adopted this exception [Rep. Tr. p. 121] and requested no further instructions. Later the Court directly submitted the question to the jury as follows:

"Everything in the case has to be proven. It has to be proven that with respect to Count Two that Exhibits I, II and III were gold bullion \* \* \* it must be proved that the substance in those exhibits was actually what is charged in the indictment."

Mr. Dunaway specifically stated that he had no exceptions to this charge [Rep. Tr. p. 134] and thus agreed to the submission of the question to the jury. Appellant is not excused from failure to make exceptions unless personal liberty is involved or a grave error amounting to a denial of a fundamental right is involved.

See:

*Humes v. United States*, 182 Fed. 485 (8 Cir., 1910);

*Zamlock v. United States*, 193 F. 2d 889 (9 Cir., 1952), cert. den. 343 U. S. 934.

For the reasons set forth in the following pages it is submitted that there is no basis for excusing appellant from excepting to the submission of the question to the jury in the instructions. In other words, he should not be relieved at this time of his implied acquiescence that the matter was one of fact to be submitted to the jury.

In the case of *United States v. Levy*, 137 F. 2d 778 (2 Cir., 1943), six bars of melted scrap gold jewelry had been recovered from the appellant. He was convicted by a jury of wilfully and knowingly possessing gold bullion without a license under Title 12, United States Code,

Section 95. The pertinent part of Judge Clark's Opinion, at page 781, is set forth below:

"[3] Turning to appellant's second point, we are clear that the six bars of melted scrap jewelry held by him were gold bullion within the terms of the authorizing act and the Presidential order. The jewelry was not of pure gold, some being gold plate, some gold filled, and some solid gold. It cannot reasonably be contended that Congress intended a general exemption of this scrap gold, once melted, since that would substantially weaken the effectiveness of the Act in preventing gold hoarding and exporting. See *British-American Tobacco Co. v. Federal Reserve Bank of New York*, *supra*, 2 Cir., 104 F. 2d at page 654. And there was a convincing expert testimony that melted scrap gold is generally considered gold bullion. The Secretary of the Treasury, too, in promulgating regulations concerning scrap gold must necessarily have considered it bullion within his authority to regulate under the Act. Witness his regulations issued September 12, 1933, requiring records of acquisitions and holdings of unmelted scrap gold; and see, also Provisional Regulation No. 35(c), for the purchase of gold fillings, clippings, pieces, and the like, 31 CFR 54.35(c).

"[4] It was generally understood when Executive Order 6260 was issued that gold bullion included gold in a form containing varying degrees of base metals. See 31 U. S. C. A. §§327, 329, 332, 360, 361. And at the trial one expert testified that the gold content of bullion need be no more than one-tenth of one per cent. True, the Treasury Regulations issued January 15, 1934, set a somewhat higher standard defining gold bullion as 'any gold which has been put through a process of smelting or refining that is in such form that its value depends upon the gold content and not

upon the form, but does not include gold coin or metals containing less than 5 troy ounces of fine gold per short ton.' See 31 CFR 52.4. And the Provisional Regulations issued under the Gold Reserve Act in effect adopted this definition. See 31 CFR 54.4. But in any event, there was expert testimony that the bars here were within this definition. And although other expert testimony was to the contrary, *the question was for the jury; and its finding of guilt settles the matter.*" (Emphasis added.)

The Court will note the 1943 Regulations involved in the *Levy* case did not have the present specifications of types of gold to be included or excluded. In other words, scrap gold was not specifically included as gold bullion as it is at the present time and the Court was not dealing with a situation where the gold involved was included in the regulation by name. Otherwise, the definition of bullion in that case was exactly the same as the regulation with which we are concerned herein. It is of interest that the District Court did not rule as a matter of law the gold was bullion although the Court of Appeals felt this fact was clearly proved. It was still felt it was a question for the jury and its determination settled the matter.

Where definitions have been laid out in the Regulations, this does not necessarily mean reasonable minds could not differ as to whether or not a particular substance would qualify as any given type of gold. Disputes may exist among the witnesses (and appellant spends several pages attempting to enumerate them here), and it is then for the jury to resolve any conflict.

It is submitted by the Government that there is no basis in reason or fact for the proposition advanced by appellant that the Court should have ruled as a matter of law Ex-

hibits I, II and III were not gold bullion. The jury in this case still had the exclusive function of determining whether or not the substance was within the purview of the definition of bullion. The evidence which was sufficient to support the jury's verdict, and which prevented the Court from ruling on this question as a matter of law, will be discussed fully in the following pages.

### **B. The Evidence Was Sufficient to Support the Verdict.**

It is of course, well settled that the Court of Appeals will not weigh evidence to determine if it is sufficient to support a verdict, that the Court will take the view most favorable to the Government, and will give to the Government the benefit of all inferences which reasonably may be drawn from the evidence. The fact that "some of the evidence is consistent with innocence is not determinative of the sufficiency of the evidence."

See:

*Woodward Laboratories, Inc., et al. v. United States*, 198 F. 2d 995 (9 Cir., 1952);

*C-O-Two Fire Equipment Co. v. United States*, 197 F. 2d 489, 491 (9 Cir., 1952), cert. den. 344 U. S. 892;

*Pasadena Research Laboratories v. United States*, 169 F. 2d 375 (9 Cir., 1948);

*Affronti v. United States*, 145 F. 2d 3 (8 Cir., 1944);

*United States v. Bucur*, 194 F. 2d 297 (7 Cir., 1952).

Not only does the Government urge that the question in this case was properly treated as a matter of fact for the

jury, but the verdict of the jury is amply supported by the evidence.

It was clearly established that the substance in Government's Exhibits I, II and III was not "gold in its natural state (more commonly termed as "placer gold"). The witnesses testified that it was not such [Rep. Tr. pp. 36, 43, 61, 69, 90-n], and Section 54.4(12) states that "gold in its natural state means gold recovered from natural sources which has not been melted, smelted, or refined, or otherwise treated by heat or by chemical or electrical process." Not only has much of the gold in Government's Exhibits I, II and III been melted, but it was also "treated by heat." It is not significant for the purposes of this brief, as appellant claims, that gold amalgam (retort sponge) is dealt with under Section 54.19 entitled "Gold in its Natural State." Section 54.3 sets forth that the titles are only for ready reference and do not constitute part of the regulations. Also, fabricated and semi-processed gold are treated under one heading in Section 54.4(10), and yet fabricated gold is expressly excluded from the definition of gold bullion and semi-processed gold is expressly included. Thus, it could well be that gold amalgam (retort sponge) is within the definition while placer gold would not be so construed. There is no reasonable basis for the conclusion made by the appellant that the Secretary of the Treasury contemplated in any sense that gold amalgam was gold in its natural state. This is particularly true since Section 54.19(a) refers directly to the definition of "gold in its natural state" in Section 54.4(12) which definition would exclude gold amalgam under Section 54.19(b).

There is substantial testimony in the record, which the jury was entitled to believe, to prove the substance was

gold bullion. Government's Exhibits I, II and III contain 800 parts of gold, while gold bullion generally can contain as low as 200 parts of gold in a thousand [Rep. Tr. p. 21]. The gold had been treated [Rep. Tr. p. 37]. Some people use heat in smelting [Rep. Tr. p. 88]. There are melted pieces in the exhibits [Rep. Tr. pp. 17, 20, 30]. The part that is melted is considered gold bullion [Rep. Tr. pp. 22, 23]. Gold bullion is an alloy and might contain silver [Rep. Tr. p. 21]. Gold bullion is mixed with lead or silver or copper [Rep. Tr. p. 86]. Exhibits I, II and III contain gold of exactly .850 fine and 127 to 130 fineness in silver [Rep. Tr. p. 15]. Gold bullion could be in lumps [Rep. Tr. p. 87]. The value of the gold is not upon its form [Rep. Tr. p. 81]. All the substance in Government's Exhibits I, II and III would be considered in the gold trade as gold bullion [Rep. Tr. p. 90-p, q].

The words used in the Regulations are to be given their normal and ordinary meaning. Specifically, there is no indication that any unusual significance attaches to the word "smelt." Webster's new International Dictionary, 2nd Edition, states it means primarily "to melt or fuse" and this appears to be its common usage, although smelting can be done through other processes. There was very little doubt the two large pieces of melted gold expressly discussed in the transcript and which weighed approximately 22 ounces were considered by Mr. Carr and Mr. Gourley to be gold bullion [Rep. Tr. pp. 30-31, 73-74]. A careful reading of all of Mr. Carr's testimony will show that he believed these cakes were bullion *both* because they were melted and on account of the fineness of gold [Rep. Tr. pp. 30-32]. Since the word to "smelt" includes to "melt," the conclusion of this expert witness is not "inherently impossible" or "improbable." In *Glaser*

*Kohn and Co. v. United States*, 224 Fed. 84, the Court of Appeals for the Seventh Circuit held, at page 87, that “*it is solely the province of the jury to determine the weight of expert opinion.* In the present case there is nothing in the evidence *inherently impossible*, or even *improbable*. The error is not well assigned.” (Emphasis added.)

Besides Mr. Carr there were two other men who testified as experts in the gold trade, Mr. Gourley and Mr. Hanson. Both were familiar with the field and the latter testified he had handled gold and minerals since 1934 [Rep. Tr. p. 90-n]. He further stated the Government’s entire exhibit would be considered gold bullion [Rep. Tr. p. 90-q]. The jury was entitled to believe Mr. Carr’s testimony that the two melted pieces recently mentioned in the transcript were gold bullion, *particularly since the definition of gold bullion in the Regulations containing the word “smelt” had been read to him previously* [Rep. Tr. p. 24]. His conclusion indirectly indicated that in the trade “smelt” could be synonymous with “melt.” There was no direct testimony that such was not the case. The jury was also entitled to believe the testimony of the mineral dealer, Mr. Hanson, that the entire exhibit was bullion since his testimony is corroborated by the physical evidence itself. A careful scrutiny by the Court of the gold in Exhibits I, II and III is most strongly urged by the Government, as an accurate picture of its condition cannot be obtained from the transcript. This is particularly true because of the remarks made by counsel from time to time during the questioning period. This writer personally inspected almost all of the pieces of gold large enough to handle and found small globules and particles of what appeared to be melted gold on practically every piece.



Many had considerable streaks of gold similar to that on the above two pieces, all of which is easily visible to the eye. No doubt much of the gold is retort sponge, but such a large amount has been melted that it has definitely taken on the character of bullion. (This is not to say, however, that retort sponge could not itself be considered within the definition of bullion.)

In *Alaska Juneau Gold Mining Co. v. United States*, 94 Ct. Cl. 15 (1942), it appears that plaintiff had obtained newly mined gold, *melted* it and cast it into bars. It was 83% pure gold, 14% silver and 3% foreign matter. It was held by the Court that the term "gold bullion" as it has been consistently understood, interpreted and applied over many years, included gold of this kind. Although that case did not apparently involve the Regulation concerned herein, the opinion is still helpful in showing the trade meaning of the phrase "gold bullion." If the word "bullion" was usually understood to include gold that has been melted, then it is not unreasonable to believe the Secretary followed that common usage in employing the word "smelted" in the Regulation.

In the *Levy* case, 137 F. 2d 778, *supra*, the Court stated at page 781:

"It cannot reasonably be contended that Congress intended a general exemption of this scrap gold, once melted, since that would substantially weaken the effectiveness of the Act in preventing gold hoarding and exporting."

The Government submits the same proposition is true with respect to the gold in this matter. Further, there was expert testimony in the *Levy* case that melted scrap gold was *generally considered* gold bullion, although the definitive Regulation was in effect at that time. Also, it is of

interest that there was a *conflict* in the expert testimony but the jury's "finding of guilt settled the matter." The Court further stated that the Secretary must have necessarily considered it bullion and within his authority to regulate under the Act and cited the appropriate regulations. Here, too, it is unlawful to hold or transport at any one time an amount of retort sponge which exceeds in fine gold content 200 troy ounces without a license. See Section 54.19(b). Title 12, United States Code, Section 95(a), is entitled "Embargo on *Bullion* or Coin, \* \* \*" (emphasis added) and the Executive Order issued pursuant thereto relates only to gold coin, *bullion* or currency. Even the Gold Reserve Act of 1934, which is partially the source of the regulations and is contained in Title 31, United States Code, Sections 441 to 446, is entitled "Gold Coin and Gold Bullion." Thus the sources of the Regulations all contemplate the regulation of gold *bullion*. It therefore appears under the reasoning of the *Levy* case that the Secretary had considered retort sponge itself as bullion and within his authority to regulate. As stated above, it was regulated in that it was unlawful to hold or transport it in excess of 200 troy ounces without a license. The amount involved in this case was over 300 ounces.

In the case of *Zamloch v. United States*, 193 F. 2d 889 (9 Cir., 1952), cert. den. 343 U. S. 934, this Court held that the jury's verdict must be affirmed unless there was an error, defect, irregularity or variance affecting a substantial right of the defendant, or that the guilt of the defendant was not found by the jury according to procedure and standards appropriate for trial in federal court.

Further, in the absence of a motion in the trial court for a judgment of acquittal or for a new trial, no question

can ordinarily be presented in the appellate court as to the sufficiency of the evidence to support the verdict. In *United States v. Jonihas*, 187 F. 2d 240, at page 241, the Court of Appeals for the Seventh Circuit stated an exception has been recognized in cases where such a condition of unfairness and injustice exists as would appeal to the Court's discretion and prompt it to correct the error in the proper administration of justice.

See also:

*Meehan v. United States*, 70 F. 2d 857 (9 Cir., 1934).

There are no circumstances here which would place this case under the exception to the rule. This was a question of fact which the jury decided against the defendant and where there was sufficient evidence to uphold the verdict. Further, it is not a case where the defendant can say he was free under the Regulations to hold and transport retort sponge over 200 troy ounces without a license. Whether this gold was bullion or sponge, or both (as the Government contends), it was illegal gold.

For the foregoing reasons it is submitted that the verdict should be affirmed.

Respectfully submitted,

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